FEDERAL COURT OF AUSTRALIA

DHI22 v Qatar Airways Q.C.S.C (No 2) [2024] FCA 348

File number(s):	NSD 837 of 2022
Judgment of:	**HALLEY J**
Date of judgment:	10 April 2024
Catchwords:	**AVIATION** – liability of an aircraft carrier for injuries allegedly suffered by the applicants – whether claim can be brought against the first respondent under the Montreal Convention – meaning of "in the course of any of the operations of embarking or disembarking" – no reasonable prospects of establishing accident took place in the course of "embarking" or "disembarking" **AVIATION** – exclusivity principle – whether Art 29 of the Montreal Convention precludes applicants from bringing claim in negligence against first respondent – whether the exclusivity principle is limited to personal injury suffered on board the aircraft or "in the course of any of the operations of embarking or disembarking" – exclusivity principle to be interpreted broadly, applying to personal injury suffered in the course of international carriage by air **NEGLIGENCE –** duty allegedly owed by first respondent to take all reasonable steps to avoid or minimise risk of harm **NEGLIGENCE** – duty allegedly owed by third respondent to take all reasonable steps to avoid or minimise risk of harm – scope and extent of duty – attribution of liability for conduct of police officers and nurse – contentions contradicted by unanswerable or unanswered evidence of a fact – pleading of material facts **TORTS –** assault, battery and false imprisonment – attribution of liability for conduct of police officers and nurse – contentions contradicted by unanswerable or unanswered evidence of a fact – pleading of material facts **PRACTICE AND PROCEDURE –** application by first respondent for summary judgment – application by first respondent for strike out – whether the pleaded claims against first respondent have reasonable prospects of success – summary judgment in favour of first respondent

PRACTICE AND PROCEDURE – application by third respondent to set aside service of originating documents – whether the pleaded claims against third respondent have insufficient prospects of success – application stood over pending consideration of amended pleading

PRACTICE AND PROCEDURE – application for leave to file a second further amended statement of claim – pleadings as currently framed not to proceed – application dismissed – leave granted to file revised amended statement of claim consistent with reasons for judgment

Legislation:

Civil Aviation (Carriers' Liability) Act 1959 (Cth), ss 9B, 9D, 9E, 9F, 12, 13, 24, 25L, Part IV, ss 28, 34, 35, 36

Evidence Act 1995 (Cth), s 174

Federal Court of Australia Act 1976 (Cth), s 31A(2)

Foreign States Immunities Act 1985 (Cth)

Federal Court Rules 2011 (Cth), rr 10.42, 10.43A,z16.02, 16.21, 26.01

Federal Court Legislation Amendment Rules 2022 (Cth)

Supreme Court Rules 1970 (NSW)

Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, 2242 UNTS 309

Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Warsaw on 12 October 1929

Protocol amending the International Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 October 1929, done at The Hague on 28 September 1955

Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955

Cases cited:

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 4

Australian Securities and Investments Commission v Cassimatis (2013) 220 FCR 256; [2013] FCA 641

Betfair Pty Ltd v Racing New South Wales (2010) 189 FCR 356; [2010] FCAFC 133

Bradken Resources Pty Ltd v Lynx Engineering Consultants Pty Ltd [2008] FCA 1257

Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649; [2009] NSWCA 258

Charlie Carter Pty Ltd v Shop Distributive and Allied

Employees Association of Western Australia (1987) 13 FCR 413

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2017] FCAFC 50

Crowley v WorleyParsons Ltd [2017] FCA 3

Danthanarayana v Commonwealth [2016] FCAFC 114

Dey v Victorian Railways Commissioners (1949) 78 CLR 62

DHI22 v Qatar Airways Q.C.S.C (No 3) [2024] FCA 351

El Al Israel Airlines Ltd v Tsui Yuan Tseng 525 US 155 (1999)

Fair Work Ombudsman v Austrend International Limited Pty Ltd (2018) 273 IR 439; [2018] FCA 171

Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486; [2012] HCA 39

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69

Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad (1998) 196 CLR 161; [1988] HCA 65

Harriton v Stephens (2006) 226 CLR 52; [2006] HCA 15

Hicks v Ruddock (2007) 156 FCR 574; [2007] FCA 299

Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd (2008) 167 FCR 372; [2008] FCAFC 60

Karpik v Carnival plc (The Ruby Princess) (Initial Trial) [2023] FCA 1280

King v American Airlines, Inc. 284 F 3d 352 (2nd Cir, 2002)

Kirby v Sanderson Motors Pty Ltd (2001) 54 NSWLR 135; [2002] NSWCA 44

Kotsambasis v Singapore Airlines Ltd (1997) 42 NSWLR 110

McAleer v University of Western Australia (No 3) (2008) 171 FCR 499; [2008] FCA 1490

McCarthy v North West Airlines, 56 F 3d 313 (1 Cir, 1995)

Schroeder v Lufthansa German Airlines, 875 F 2d 613 (7th Cir, 1989)

McGuirk v University of New South Wales [2009] NSWSC 1424

Parkes Shire Council v SW Helicopters Pty Ltd (2019) 266 CLR 212

Polar Aviation Pty Ltd v Civil Aviation Safety Authority (2012) 203 FCR 325; [2012] FCAFC 97

Povey v Qantas Airways Ltd (2005) 233 CLR 189; [2005] HCA 33

Rd DC Pty Ltd v Zhang (No 3) [2024] FCA 221

Salih v Emirates [2020] NSWCA 215

Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd (1980) 147 CLR 142

Sidhu v British Airways Plc [1997] AC 430

Siemens Ltd v Schenker International (Australia) Pty Ltd (2004) 216 CLR 418; [2004] HCA 11

Smith v Leurs (1945) 70 CLR 256; [1945] HCA 27

South Pacific Air Motive Pty Ltd v Magnus (1998) 87 FCR 301

Spencer v Commonwealth (2010) 241 CLR 118; [2010] HCA 28

Stott v Thomas Cook Tour Operators Ltd [2014] AC 1347

Sutherland Shire Council v Heyman (1984) 157 CLR 424; [1985] HCA 41

Three Rivers District Council v Bank of England [No 3] [2003] 2 AC 1

Thorpe v Commonwealth (No 3) (1997) 144 ALR 677; [1997] HCA 21

ThoughtWare Australia Pty Limited v IonMy Pty Ltd [2023] FCA 906

Turturro v Continental Airlines, 128 F Supp 2d 170 (NY, 2001)

United Airlines v Sercel (2012) 289 ALR 682; [2012] NSWCA 24

Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62

Division:	General Division
Registry:	New South Wales
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	278
Date of hearing:	30 November 2023
Counsel for the Applicants:	Dr C Ward SC with Mr R Reynolds
Solicitor for the Applicants:	Marque Lawyers
Counsel for the First Respondent:	Mr B Walker SC with Ms T Epstein
Counsel for the Third Respondent:	Mr B Walker SC with Mr J Entwistle

Solicitor for the First and Third Respondents:	Morris Mennilli

ORDERS

NSD 837 of 2022

BETWEEN:	**DHI22** First Applicant
	DHJ22 Second Applicant
	DHK22 (and others named in the Schedule) Third Applicant
AND:	**QATAR AIRWAYS GROUP Q.C.S.C** First Respondent
	QATAR CIVIL AVIATION AUTHORITY Second Respondent
	QATAR COMPANY FOR AIRPORTS OPERATION AND MANAGEMENT W.L.L Third Respondent

ORDER MADE BY:	**HALLEY J**
DATE OF ORDER:	**10 APRIL 2024**

THE COURT ORDERS THAT:

1. The interlocutory application of the applicants dated 13 September 2023 seeking leave to amend the further amended statement of claim in the form annexed to the interlocutory application is dismissed.
2. Judgment in favour of the first respondent in relation to the whole of the further amended originating application and the further amended statement of claim insofar as they advance causes of action against the first respondent.
3. Leave be granted to the applicants to file and serve a second further amended originating application and a second further amended statement of claim that are consistent with these reasons for judgment (**Amended Pleadings**), by **4.30 pm** on **Friday, 3 May 2024**.
4. Leave be granted to the applicants to serve the Amended Pleadings on the third respondent, pursuant to r 10.44 of the *Federal Court Rules 2011* (Cth) (**Rules**).

5. Pursuant to r 10.24 or alternatively, r 10.49 of the Rules, personal service of the Amended Pleadings on the third respondent is dispensed with, and the applicants may serve a sealed copy of the Amended Pleadings on the third respondent by transmitting them by email to the solicitors for the third respondent, at smorris@m2law.com.au and triddell@m2law.com.au.

6. Order 4 and Order 5 of these orders are made without prejudice to any application that the third respondent might subsequently seek to make.

7. The proceedings be listed for a case management hearing at **9.30 am** on **Friday, 10 May 2024**.

8. The third respondent's interlocutory application dated 30 June 2023 seeking an order that service on it of the further amended originating application be set aside, be stood over for mention at the case management hearing on Friday, 10 May 2024.

9. The applicants and the first respondent are to confer and seek to reach agreement on the costs of the first respondent, failing which the parties are to exchange short written submissions and any evidence in support of the orders they seek, by **4.30 pm** on **Friday, 3 May 2024,** and the question of the costs of the first respondent will be determined at the case management hearing on Friday, 10 May 2024.

10. The costs of the applicants and the third respondent, of and incidental to the third respondent's interlocutory application dated 30 June 2023, be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

HALLEY J:

A. INTRODUCTION

1 Late at night on 2 October 2020, all the female passengers of a Qatar Airways flight from Doha to Sydney (**Qatar Airways flight**) were directed to disembark the aircraft while it remained on the tarmac of the Hamad International Airport in Doha (**Doha Airport**). Some of the female passengers were then subjected to invasive examinations in an ambulance on the tarmac of the airport before they were permitted to reboard the aircraft. The explanation subsequently provided by the Qatar Ministry of Interior (**MOI**) for the invasive examinations was that a newborn baby had been discovered in a rubbish bin, within a toilet cubicle, within the airport terminal, and it was necessary to identify the mother of the abandoned baby.

2 On 31 October 2020, the Foreign Ministry of the State of Qatar and the Department of Foreign Affairs and Trade of Australia published a joint statement in which the Deputy Prime Minister and Minister of Foreign Affairs of Qatar expressed his deepest sympathies for all the women impacted by the invasive examinations conducted at the Doha Airport and stated that the incident is "considered a violation of Qatar's laws and values, and that the officials involved have been referred to the Public Prosecution Office". The invasive examinations conducted on the evening of 2 October 2020 included, but were not limited to, female passengers on the Qatar Airways flight.

3 The applicants were five of the women on the Qatar Airways flight. They seek declarations and damages, including exemplary damages against the first respondent (**Qatar Airways**), the second respondent, the Qatar Civil Aviation Authority (**QCAA**), and the third respondent (**MATAR**). MATAR is the operator of the Doha Airport and is a wholly owned subsidiary of Qatar Airways.

4 Three of the applicants bring a claim against Qatar Airways for damages under the *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montreal on 28 May 1999, 2242 UNTS 309 (**Montreal Convention**), and claims for battery against the QCAA and MATAR.

5 Each of the five applicants bring claims against Qatar Airways, the QCAA and MATAR in negligence and claims for assault and false imprisonment.

6 Before the Court for determination are interlocutory applications filed by each of the parties to the proceedings. These reasons for judgment address the interlocutory applications filed by:

(a) the applicants seeking leave to amend the further amended statement of claim in the form annexed to their interlocutory application (**proposed 2FASOC**) that seeks to address pleading issues raised by the respondents (**Amendment Application**);

(b) Qatar Airways seeking summary judgment pursuant to s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) and r 26.01 of the *Federal Court Rules 2011* (Cth) (**Rules**) and in the alternative an order pursuant to r 16.21 of the Rules that paragraphs 29, 30, 31, 33, 34 and 35 of the further amended statement of claim be struck out (**Qatar Airways application**); and

(c) MATAR seeking orders that the order of the Court granting leave to the applicants to serve the originating documents on MATAR be set aside pursuant to r 10.43A of the Rules (**MATAR application**).

7 The interlocutory application filed by the QCAA seeks orders, in reliance on s 38 of the *Foreign States Immunities Act 1985* (Cth) (**FSI Act**), setting aside (a) the order of the Court granting the applicant leave to serve the QCAA with the originating documents in these proceedings, and (b) the originating documents insofar as they make claims against the QCAA. That application has been determined in a separate judgment: *DHI22 v Qatar Airways Q.C.S.C (No 3)* [2024] FCA 351.

8 Both Qatar Airways and MATAR oppose the Amendment Application but each was content to advance their applications by reference to the facts alleged and causes of action pleaded in the proposed 2FASOC rather than the further amended statement of claim. This was a convenient and practical course in order to ensure that the applicants' most recent proposed formulation was addressed in the respective applications.

9 The principal issues raised for determination are:

(a) are the first, third and fourth applicants able to bring a claim against Qatar Airways under the Montreal Convention;

(b) does the Montreal Convention preclude the applicants from bringing claims in negligence against Qatar Airways;

(c) if the answer to question (b) is "no", do all the negligence claims as pleaded against Qatar Airways otherwise have no reasonable prospects of success;

(d) do the negligence and intentional tort claims, as currently sought to be pleaded against MATAR have insufficient prospects of success to warrant putting MATAR to the time, expense, and trouble of defending them; and

(e) should leave be given to the applicants to replead the negligence claims against MATAR in conformity with these reasons for judgment.

10 For the reasons that follow, I have concluded that the first question must be answered "no", the second question must be answered "yes", the third question must be answered "no", and the fourth and fifth questions must be answered "yes".

B. EVIDENCE

11 Both Qatar Airways and MATAR rely on the following affidavits in support of their interlocutory applications:

(a) affidavits of Simon Morris, solicitor for the first and third respondents, sworn on 13 March 2023 and 27 March 2023;

(b) an affidavit of Ioannis Metsovitis, the Senior Vice-President of Operations for MATAR, affirmed on 19 July 2023;

(c) an affidavit of Giorgio Buffa, the Senior Manager of Operations for MATAR at the Doha Airport, sworn on 19 July 2023;

(d) an affidavit of Elton Coutinho, the Cabin Service Director on the Qatar Airways flight, sworn on 23 July 2023; and

(e) affidavits of Thomas Riddell, solicitor for the first and third respondents, affirmed on 27 September 2023 and 8 November 2023.

12 Qatar Airways and MATAR also relied on copies of the following extracts of the law of Qatar pursuant to s 174 of the *Evidence Act 1995* (Cth):

(a) Law No. 23 of 1993 regarding the police force; and

(b) Law No. 11 of 2004 Issuing the Penal Code (**Qatar Penal Code**).

13 The applicants rely on the affidavits of Damian Sturzaker, solicitor for the applicants, affirmed on 13 September 2023 and 27 October 2023.

14 The applicants also rely on the copies of transcripts of interviews conducted by the Australian Federal Police (**AFP**) with each of the first to fourth applicants and the witness statement that

the fifth applicant provided to the AFP, annexed to the affidavit of Simon Morris sworn on 27 March 2023.

C. PROCEDURAL HISTORY OF THE PROCEEDINGS

15 On 29 September 2022, the applicants commenced these proceedings against Qatar Airways and the QCAA by filing an originating application and a statement of claim.

16 On 10 October 2022, the applicants filed an amended originating application and an amended statement of claim (**ASOC**).

17 On 13 March 2023, Qatar Airways lodged for filing an interlocutory application for summary judgment and in the alternative sought an order that paragraphs 29, 30, 31, 33, 34 and 35 of the ASOC be struck out. The interlocutory application was accepted for filing on 27 March 2023.

18 On 23 May 2023, the applicants filed a further amended originating application (**FAOA**) and a further amended statement of claim (**FASOC**). The applicants joined MATAR to the proceedings as a third respondent in the FAOA and the FASOC.

19 On 26 May 2023, Qatar Airways lodged for filing the Qatar Airways application, for summary judgment and in the alternative sought an order that paragraphs 29, 30, 31, 33, 34 and 35 of the FASOC be struck out. The Qatar Airways application was accepted for filing on 7 June 2023.

20 On 8 June 2023, the Court made orders granting leave to the applicants pursuant to r 10.44 of the Rules to serve the FASOC on MATAR, dispensing with the need for personal service of the FAOA and FASOC and permitting those documents to be served on MATAR by transmitting them by email to the solicitors for Qatar Airways.

21 On 3 July 2023, MATAR lodged the MATAR application for filing seeking an order that service of the FAOA be set aside. The MATAR application was accepted for filing on 6 July 2023.

22 On 13 September 2023, the applicants filed the Amendment Application, seeking leave to amend the FASOC.

23 On 30 November 2023, the Amendment Application was heard together with the Qatar Airways application and the MATAR application.

D. MATERIAL FACTS PLEADED BY THE APPLICANTS

24 The material facts pleaded in the proposed 2FASOC constituting the alleged "**Incident**" provide the foundation for each of the claims sought to be advanced by the applicants against Qatar Airways and MATAR.

25 The material facts relied upon by the applicants are pleaded in the proposed 2FASOC as follows:

> 9. On the evening of 2 October 2020, a newborn baby was allegedly found in a bathroom in the terminal of Doha Airport.
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> 10. On 2 October 2020, at approximately 8:00pm Arabia Standard Time (AST), the Applicants had boarded Qatar Airways flight QR908 and the aircraft was parked at the terminal awaiting take-off.
>
> 11. After a three-hour delay, at approximately 11:00pm AST, the aircraft reversed away from the terminal at Doha Airport for approximately one minute before returning back to the terminal.
>
> 12. At the Doha Airport terminal:
>
> (a) there was an announcement over the aircraft cabin audio system that all female passengers were required to exit the aircraft with their passports; and
>
> (b) persons in dark uniforms armed with guns entered the aircraft.
>
> 13. The Applicants exited the aircraft. The Fourth Applicant exited with her 5-month-old infant son. Members of the Qatar Airways flight crew directed and assisted the Fifth Applicant, who is legally blind, to exit the aircraft.
>
> 14. The Applicants were directed by members of the Qatar Airways flight crew and by armed and unarmed persons in dark uniforms to a departure lounge within the Doha Airport terminal.
>
> 15. The First, Second~~,~~ and Third~~, and Fourth~~ Applicants were separately directed by the armed persons and unarmed persons in dark uniforms into a lift and down to a lobby near the tarmac.
>
> 15A. The Fourth Applicant was separately directed by an unidentified female employee or agent of the Third Respondent into a lift with armed persons In dark uniforms and was escorted by these armed persons in dark uniforms down to a lobby near the tarmac.
>
> 16. The Fifth Applicant was separately directed by ~~the armed persons and unarmed persons in dark uniforms by~~ a member~~s~~ of the Qatar Airways flight crew into a lift and down to a lobby near the tarmac.
>
> 17. The First Applicant was directed by armed and ~~or~~ unarmed persons in dark uniforms onto the tarmac and into an ambulance where a female who appeared to her to be a nurse was present. The First Applicant was:
>
> (a) required to lie down on the ambulance bed and take off her pants and underwear;

(b) subjected to a gynaecological examination by the nurse, without consent, during which the nurse [conducted an intimate examination];

(c) subsequently directed back to the aircraft by armed or unarmed persons in dark uniforms ~~armed with guns~~.

18. The Second Applicant was directed by a man ~~persons~~ in a dark uniform ~~armed with guns~~ onto the tarmac and into an ambulance where a female who appeared to her to be a nurse was present. The Second Applicant:

(a) entered the ambulance with another unknown female passenger from flight QR908;

(b) was required to take off her pants and underwear;

(c) was subjected to a gynaecological inspection by the nurse, without consent;

(d) subsequently directed back to the aircraft by employees or agents or the First Respondent and/or Third Respondent ~~armed guards~~.

19. The Third Applicant was directed by armed and unarmed persons in dark uniforms ~~armed with guns~~ onto the tarmac and into an ambulance where a female who appeared to her to be a nurse was present. The Third Applicant was:

(a) required to lie down on the ambulance bed, unzip her pants and lift up her t-shirt;

(b) physically examined and touched by the nurse on her stomach and breasts, without consent;

(c) subsequently directed back to the aircraft by an armed ~~guards~~ person in dark uniform.

20. The Fourth Applicant was directed by persons in dark uniforms armed with guns onto the tarmac. ~~and~~ She was directed by an unidentified employee or agent of the Third Respondent to get into an ambulance with her infant son, where a female who appeared to her to be a nurse was present. The Fourth Applicant:

(a) was required to lie down on the ambulance bed with her son on her chest;

(b) had her pants and underwear forcibly pulled downwards by the nurse, without consent;

(c) was subjected to a gynaecological inspection by the nurse, without consent;

(d) had her pants and underwear pulled upwards by the nurse;

(e) subsequently directed back to the aircraft by an unidentified staff member of the ~~Second~~ Third Respondent.

21. The Fifth Applicant was:

(a) directed by ~~persons in dark uniforms armed with guns~~ a member of the Qatar Airways flight crew ~~onto~~ towards the tarmac ~~towards an ambulance,~~ and armed or unarmed men in dark uniforms stepped

forward to direct her;

{b) observed ~~another armed~~ an unidentified male ~~person~~ employee or agent of the Third Respondent in civilian attire say words to the effect of "no, not her";

(c) then directed back to the aircraft by a member of the Qatar Airways flight crew ~~persons in dark uniforms armed with guns~~.

26 The underlined words and the words struck through reflect the amendments sought to be advanced in the proposed 2FASOC. They are principally directed at replacing references to "persons in dark uniforms armed with guns" with references to "armed or unarmed men", an "unidentified employee or agent" of the first or third respondents, and "a member of the Qatar Airways flight crew".

E. ARTICLE 17 OF THE MONTREAL CONVENTION CLAIMS

E.1. Statutory provisions and legal principles

27 Both Australia and Qatar are parties to the Montreal Convention**.**

28 The Montreal Convention applies to all international carriage of persons performed by aircraft for reward. It is given legal force in Australia by s 9B of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**CACL Act**).

29 The predecessor to the Montreal Convention was the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, done at Warsaw on 12 October 1929, 478 UNTS 371 (**Warsaw Convention**) as subsequently amended on several occasions, including by the Protocol to Amend the [Warsaw Convention], made at the Hague on 28 September 1955, (**Hague Protocol**) and by the Montreal Protocol No. 4 to Amend the [Warsaw Convention] done at Montreal on 25 September 1975 (**Montreal No 4**).

30 The principles governing the construction of international treaties are well settled. As the High Court explained in ***Povey*** *v Qantas Airways Ltd* (2005) 233 CLR 189; [2005] HCA 33 at [24] (Gleeson CJ, Gummow, Hayne and Heydon JJ) in construing the provisions of Montreal No 4:

> 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. 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 gained from extrinsic sources (Art 32) 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".

(Footnotes omitted.)

31 An important principle governing the construction of international treaties is that they should be interpreted uniformly between contracting States: *Povey* at [25], citing *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (1980) 147 CLR 142 at 159 (Mason and Wilson JJ); *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161; [1988] HCA 65 at [70] (McHugh J), and [137] (Kirby J); *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2004) 216 CLR 418; [2004] HCA 11 at [153]-[154] (Kirby J). Although ultimately the task is to identify what does the treaty provide and how is it carried into Australian law: *Povey* at [25].

32 The purpose of the Warsaw Convention was to create a uniform international code to govern the liability of carriers that could be applied by courts in all the contracting States without resort to the rules of domestic law: ***Parkes Shire Council*** *v SW Helicopters Pty Ltd* (2019) 266 CLR 212 at [10]; [2019] HCA 14 (Kiefel CJ, Bell, Keane and Edelman JJ), citing ***Sidhu*** *v British Airways Plc* [1997] AC 430 at 453 (Lord Hope of Craighead, with whom Lord Browne-Wilkinson, Lord Jauncey of Tullichettle, Lord Mustill and Lord Steyn agreed).

33 The liability of a carrier for death or bodily injury is dealt with in Art 17(1) of the Montreal Convention in materially identical terms to Art 17 of the Warsaw Convention.

34 Article 17(1) of the Montreal Convention provides:

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

35 An action for damages resulting from death or injury can be brought before the courts at the place of destination of the aircraft, or in the territory of a State Party in which (at the time of the accident) the passenger had their principal and permanent residence: Art 33 of the Montreal Convention.

36 Qatar Airways is a "carrier" within the meaning of the Montreal Convention.

37 The meaning to be given to "accident" in Art 17 was considered by the High Court in *Povey*. The plurality stated at [32]-[34] (Gleeson CJ, Gummow, Hayne and Heydon JJ):

> 32 As was pointed out in [*Air France v* ***Saks*** 470 US 392 (1985)], 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. It was said in *Saks* 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. 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).
>
> 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" 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.
>
> (Footnotes omitted.)

38 Subsequently, the New South Wales Court of Appeal in ***Salih*** *v Emirates* [2020] NSWCA 215 at [4] (Gleeson JA, with whom Bell P and McCallum JA agreed) emphasised that "accident" in Art 17 is a reference to the "event" fixed by reference to a particular time and place that is external to the passenger, rather than the cause of the injury. In *Salih,* the overhead compartment door opening onto the plaintiff's thumb was found to be the *cause* of the injury, but not an *accident,* given factual findings by the primary judge that there was no defect or fault in the overhead compartment door.

39 Any determination of whether an accident took place on board an aircraft is unlikely to give rise to any substantive dispute. The question of what is encompassed by the concept of "in the course of any of the operations of embarking or disembarking" is less straightforward.

40 In ***Kotsambasis*** *v Singapore Airlines Ltd* (1997) 42 NSWLR 110, the New South Wales Court of Appeal considered what constitutes "in the course of any of the operations of embarking or disembarking". The leading judgment was given by Meagher JA, with whom Powell and Stein JJA relevantly agreed. At 118-119, Meagher JA observed that there did not appear to be any Australian authority dealing with the phrase, but noted it had been considered in the United

States in *McCarthy v North West Airlines*, 56 F 3d 313 (1 Cir, 1995) at 316-317, in which Selya J stated:

> Given the historical record and the signals that the Supreme Court has sent, most courts have interpreted the terms 'embarking' and 'disembarking' to connote a close temporal and spatial relationship with the flight itself. In the process, these courts have found a three-pronged inquiry to be useful. The inquiry focuses on (1) the passenger's activity at the time of injury; (2) his or her whereabouts when injured, and (3) the extent to which the carrier was exercising control at the moment of injury [authorities cited] …We do not view the three factors — activity, location, and control — as separate legs of a stool, but, rather, as forming a single unitary base. In the last analysis, the factors are inextricably intertwined.
>
> What is more, the language of Article 17 — which speaks to accidents that occur 'in the course of any of the operations of embarking' — strongly suggests that there must be a tight tie between an accident and the physical act of entering an aircraft. See *Martinez Hernandez*, 545 F 2d at 283–4 (concluding that the drafters of the Warsaw Convention understood embarking 'as essentially the physical activity of entering' an airplane); see also *Evangelinos* 550 F 2d at 155. This 'tying' concept informs location as well as activity. Consequently, for Article 17 to attach, the passenger must not only do something that, at the particular time, constitutes a necessary step in the boarding process, but also must do it in a place not too remote from the location at which he or she is … to enter the designated aircraft.

41 His Honour, Meagher JA, then stated at 119:

> I accept that location, activity and control are useful in determining whether, on the facts of any given case, an accident can be regarded as having occurred in the process of embarking or disembarking. They may not be the only factors and, in the end, the answer will lie in the facts of the particular case. However, I would stress that regard has to be directed to the intention of the contracting parties to the Convention and that intention was to impose absolute liability in certain, fairly narrow, circumstances. In interpreting the words "embarking or disembarking" it should be remembered that the Convention is to be read parsimoniously.

42 The three-pronged inquiry described in *Kotsambasis* was also applied in ***Schroeder*** *v Lufthansa German Airlines*, 875 F 2d 613 (7th Cir, 1989). There, the plaintiff was an innocent victim of a malicious bomb threat, who had allegedly suffered psychological injury after she was taken off a Lufthansa aircraft by the Royal Canadian Mounted Police (**RCMP**) for an investigation, where she was subjected to questioning and a personal search. The plaintiff had initially been detained and questioned in the cockpit of the aircraft after the pilots had made an emergency landing at an airport in Gander, Canada after being notified by an air traffic control centre in Moncton, Canada that the plaintiff was carrying a bomb in her luggage. No complaint was made by the plaintiff about her initial detention and questioning by the Lufthansa pilots.

43 The Court determined that the plaintiff's claims did not fall within Art 17 of the Warsaw Convention because the "accident" that caused the alleged injuries did not take place on board

the aircraft or "in the course of embarking or disembarking from the airplane": *Schroeder* at 618. In reaching that conclusion the Court placed particular weight on the fact that (a) the detention and search by the RCMP were conducted in the terminal building, away from the aircraft, (b) the questioning was about a bomb threat, which had no relationship to a passenger's embarking or disembarking from a plane, and (c) the airline had no control over the passenger or the RCMP during the course of the detention: *Schroeder* at 618. The Court also noted that although the plaintiff had alleged that the RCMP were acting as agents for Lufthansa, no facts were presented to support this bare allegation.

44 The three-pronged inquiry approach was also applied in ***Turturro*** *v Continental Airlines*, 128 F Supp 2d 170 (NY, 2001), the plaintiff was a passenger on a Continental Airlines (**Continental**) flight. The plaintiff requested to leave the aircraft, shortly before it pulled back from the departure gate, because of a panic attack due to her longstanding fear of flying and her discovery that her pocketbook with her anxiety medication had been stolen. After approximately 60 to 90 minutes on the tarmac, the pilots on the aircraft agreed to return to the gate and deplane the plaintiff. She was met by some Continental employees, medical personnel and police employed by the Port Authority of New York and New Jersey (**Port Authority**). A decision was then alleged to have been made by the Port Authority to transport the plaintiff against her will to the psychiatric emergency room at a medical centre where she remained in custody and under observation for several hours: *Turturro* at 173.

45 The Court applied the three-pronged approach in addressing an allegation that conversations between Continental agents and the police led to the plaintiff's involuntary removal to the psychiatric emergency room. The Court concluded that the alleged crucial acts took place after "disembarking" and after the plaintiff had been delivered into the hands of the police and the medical team. The Court accepted that Continental employees were present and spoke with the police and the medical team, but the Court was satisfied at that time, the police, and perhaps also the medical team, not Continental, controlled the plaintiff's movements. The Court also relied on the conversations taking place in a waiting area of the terminal, rather than in a restricted area used only for the exiting of an aircraft.

E.2. Qatar Airways' submissions

46 Qatar Airways submits that the relevant accident in this case, namely the invasive examinations in the ambulance on the tarmac, did not take place in the course of the operations of embarking or disembarking. It submits, by reference to the three-pronged inquiry, that (a) the conduct of

"the persons in dark uniforms and the nurse" formed no part of the operations of embarking or disembarking the aircraft, (b) the applicants were in an ambulance on the tarmac and not in the aircraft or in an area of the airport controlled by Qatar Airways, and (c) at the time of the invasive examinations, each of the first, third and fourth applicants were under the control of "the persons in dark uniforms and/or the nurse".

E.3. The applicants' submissions

47 The applicants submit that for the following reasons, it cannot be concluded that there are only fanciful prospects of establishing that the invasive examinations of the first, third and fourth applicants took place in the course of any of the operations of them embarking or disembarking the aircraft.

48 *First*, there is a question of law as to the correct test to be used to determine whether an incident took place in the course of any of the operations of embarking or disembarking an aircraft. They submit that although the three-pronged, location, activity, and control test, has been said to be useful, no Court has treated the inquiry as determinative, citing *Kotsambasis* at 119.

49 *Second*, even if the three-pronged inquiry was the correct test, it raises very significant factual questions that would need to be determined at a final hearing. They submit these include the precise location of the ambulance in relation to the aircraft, how much time had elapsed between the invasive examinations and the applicants re-entering the aircraft, what was the route taken by the first, third and fourth applicants back to the aircraft from the ambulance and to what extent did Qatar Airways exercise control over its corporate subsidiary, MATAR, as the contracted manager and operator of the Doha Airport.

50 *Third*, on the basis of the facts pleaded and the evidence filed to date, the first, third and fourth applicants have reasonable prospects of establishing that the invasive examinations took place in the course of embarking or disembarking the aircraft. They submit that the applicants were on the aircraft, it returned to the gate, they disembarked for the only purpose of the invasive examinations, and their re-embarkation was conditional upon their invasive examination. They submit that these events were all "part of one coherent, linked, process".

51 The applicants submit as to location that the fourth applicant had given evidence to the AFP that the ambulance was "under the plane". The applicants therefore submit that the cases of *Schroeder* and *Turturro* discussed above are distinguishable, as the relevant events in those cases occurred in the terminal, away from the aircraft.

52 As to activity, the applicants submit that there was a direct relationship between the invasive examinations and the applicants disembarking and re-embarking the aircraft. The applicants were directed off the aircraft for the sole purpose of the invasive examinations and only permitted to reboard after the invasive examinations.

53 As to control, the applicants submit that Qatar Airways was in a position to direct the activities of its wholly owned subsidiary, MATAR, the airport operator, but there is no evidence that it made any effort to do so.

54 Further, the applicants submit that (a) temporally the invasive examinations took place just before reboarding or alternatively after they had boarded the aircraft and were awaiting take off, (b) there was a total restraint on their liberty, (c) the male passengers remained on the aircraft, including the first applicant's husband, and (d) the baggage of the applicants was not removed from the aircraft while the invasive examinations took place. They submit that the first two matters address the "imminence of actual boarding" and "restrictions on passengers' movements" factors in *King* and the last two matters demonstrate the strong relationship between the invasive examinations and disembarking and embarking the aircraft.

E.4. Consideration

55 It is first necessary to identify the "accident" alleged by the applicants in the proposed 2FASOC that is the subject of the claims under the Montreal Convention against Qatar Airways.

56 The "accident" is relevantly pleaded in the proposed 2FASOC at [29] in the following terms:

> The First Applicant, the Third Applicant and the Fourth Applicant have sustained damage in case of bodily injury by reason of the events described at paragraphs 17, 19 and 20. These events took place in the course of any of the operations of embarking or disembarking Flight QR908, by reason of paragraphs 11 to 21 above.

57 It is readily apparent that the "accident" that is alleged to have given rise to the bodily injury is the events pleaded in the proposed 2FASOC at [17], [19] and [20]. Those paragraphs are directed at the invasive examinations of the first, third and fourth applicants. The events described in those paragraphs are limited to the alleged conduct of persons variously described as "armed and unarmed persons in dark uniforms", "a female who appeared [to the first, third and fourth applicants] to be a nurse", "persons in dark uniforms armed with guns" and "an unidentified employee or agent of the Third Respondent". No allegation is made in those paragraphs that any employee or agent of Qatar Airways engaged in any of that conduct.

58 The allegation that the events took place in the course of "the operations of embarking or disembarking" the aircraft by reasons of the matters alleged in the proposed 2FASOC at [11] to [21] does not have the effect of expanding the "accident" to include matters alleged at [11] to [16], [18] and [21], some of which include alleged conduct of the Qatar Airways flight crew. Rather, those paragraphs are sought to be relied upon to bring the "accident" within the "embarking" or "disembarking" limbs of Art 17(1) of the Montreal Convention.

59 On no view did the invasive examinations of the first, third and fourth applicants take place "on board the aircraft". Further, I am satisfied, for the following reasons, that the applicants do not have reasonable prospects of establishing that the invasive examinations of the first, third and fourth applicants took place in "the course of any of the operations of embarking or disembarking" the aircraft.

60 *First*, the "accident" relied upon by the applicants, namely the invasive examinations of the first, third and fourth applicants took place in an ambulance on the tarmac.

61 In order for the invasive examinations to take place, the first, third and fourth applicants had to disembark the aircraft. It can readily be accepted that the "operations of disembarking" would extend to the means by which a passenger was conveyed from an aircraft to an airport terminal. The operations of disembarking would thus extend to leaving an aircraft by means of an aerobridge, boarding stairs, or a bus transporting passengers from a remote landing bay to the terminal. In the latter two cases, movement on foot or in a vehicle would involve passage over the tarmac.

62 I do not accept, however, that it is reasonably arguable that the process of disembarking would extend to an invasive examination conducted by a nurse in an ambulance on the tarmac at the direction of officers of a State instrumentality, as part of a police operation, to determine the identity of the mother of an abandoned newborn baby. Such an invasive examination can readily be distinguished from any examination that might be conducted as part of security screening of passengers by airline staff at the gate prior to passengers boarding an aircraft or after they had disembarked an aircraft.

63 Textually, the liability of an airline in Art 17 is limited to specific locations and activities. In my view the ordinary meaning of "in the course of any of the operations of embarking or disembarking" when understood in the context of the strict liability imposed on an airline for

death or injuries to passengers that arise from an accident that falls within Art 17, cannot extend to an invasive examination undertaken by a State enforcement authority in an ambulance.

64 *Second*, I am satisfied that none of the matters that the applicants have identified can reasonably be characterised as significant factual matters that would require determination at a final hearing in order to determine whether the accident took place in the course of any of the operations of disembarking or embarking the aircraft. There was no suggestion that the ambulance was physically connected to the aircraft. It was common ground that the "accident" occurred in the ambulance. Evidence of the precise distance between the ambulance and the aircraft, the specific time that had elapsed between the invasive examinations and re-embarkation or the particular route taken by the first, third and fourth applicants back to the aircraft could not rationally assist in determining whether the accident took place in the course of the operations of disembarking or embarking the aircraft.

65 *Third*, the one "coherent linked process" was the police operation undertaken at the direction of the officers of the MOI. That process commenced with a direction to disembark the aircraft, a movement to an ambulance, an invasive examination in the ambulance and then after the invasive examination had been undertaken, a movement back to the aircraft and then a direction to re-embark. The security operation necessarily included "disembarkation" and "embarkation" but that does not carry with it any implication that the "accident" occurred in the course of the operations of disembarkation or embarkation.

66 *Fourth*, and relatedly, any requirement that the applicants were not permitted to reboard the aircraft unless the invasive examinations were performed cannot by itself have the effect of making that requirement an act in the course of any of the operations of embarking or disembarking an aircraft. The relevant nexus must be an act that falls within the "operations" of embarking or disembarking an aircraft. In my view, it is not reasonably arguable that the operations of embarking or disembarking an aircraft could extend to a requirement to undertake an invasive examination by a nurse as part of a police operation seeking to determine if the examinee had just given birth.

67 *Fifth*, the applicants' submission that Qatar Airways was "in a position to direct the activities of its subsidiary MATAR and there is no evidence that it made any effort to do so", does not arise above mere conjecture or speculation. No material facts are pleaded from which such a conclusion could be drawn. The evidence in the AFP interviews of the third to fifth respondents relied upon by the applicants to establish the involvement of Qatar Airways and MATAR in

the MOI police operation is of no assistance to any allegation that Qatar Airways was in a position to "control" the conduct of MATAR in connection with the MOI police operation. That evidence comprised statements made by the third applicant that at least one of the persons who directed her had the word "security" on their back, by the fourth applicant that it was "someone from the airport" and not an armed guard who told her to get into the ambulance, and by the fifth applicant that a "Qatar air hostess" directed her onto the tarmac, before a man said, "not her". The statements provide evidence of the involvement of the Qatar Airways flight crew and potentially of MATAR security contractors in the MOI police operation, but they are not evidence from which it could be concluded that Qatar Airways was in a position to direct the operations of its subsidiary, MATAR, in that operation.

68 Moreover, the relevant issue is any control that Qatar Airways may have had over the officers of the MOI conducting the police operation and the nurse in the ambulance, not any control over MATAR. I am satisfied for the reasons advanced at [251] to [253] below that the evidence relied on by Qatar Airways and MATAR establishes that the security operation was directed by officers of the MOI, and the nurse was not an employee of either Qatar Airways or MATAR. Further, no material facts have been alleged that would establish that either the nurse or any officer of the MOI was subject to any control of Qatar Airways or MATAR. The proposition that Qatar Airways was able to exert any relevant control over the officers of the MOI conducting the police operation or the nurse in the ambulance can fairly be characterised as "fanciful, trifling, implausible, improbable, tenuous or one that is contradicted by all the available documents or other materials".

F. THE EXCLUSIVITY PRINCIPLE

F.1. Overview

69 Before considering the negligence claims advanced by the applicants in the proposed 2FASOC, it is first necessary to address a potential threshold barrier to the negligence claims that the applicants seek to advance against Qatar Airways.

70 Qatar Airways contends that the negligence claims against it cannot be maintained because of what is generally referred to as the "exclusivity principle" in the Montreal Convention.

F.2. Statutory provisions and principles

71 The principle that is generally referred to as the "exclusivity principle" is contained in Art 29 of the Montreal Convention. It provides:

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

72 The exclusivity provision in the Warsaw Convention was contained in Art 24, in substantially similar terms. In ***Stott*** *v Thomas Cook Tour Operators Ltd* [2014] AC 1347, Lord Toulson JSC, with whom the other Justices of the United Kingdom Supreme Court agreed, stated at [31] that the effect of Art 29 of the Montreal Convention is the same as that of Art 24 of the Warsaw Convention, except for the addition of the sentence specifically excluding punitive, exemplary, or other compensatory damages. It was the effect of the exclusivity provision in Art 24 of the Warsaw Convention that was at issue in the earlier cases of *Sidhu*, *El Al Israel Airlines Ltd v Tsui Yuan* ***Tseng*** 525 US 155 (1999) and ***King*** *v American Airlines, Inc.* 284 F 3d 352 (2nd Cir, 2002). The exclusivity principle is in turn, adopted in this country pursuant to s 9E of the CACL Act.

73 Section 9E of the CACL Act provides:

> Subject to section 9F, the liability of a carrier under the Convention, in respect of personal injury suffered by a passenger that has not 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

74 Section 9F of the CACL Act is concerned with indemnities and contributions payable to joint tortfeasors, and in relation to workers compensation, and does not relevantly arise in this proceeding.

F.3. Submissions

F.3.1. Qatar Airways' submissions

75 Qatar Airways submits that consistently with the express words of s 9E of the CACL Act, *Sidhu*, *Tseng* and *Parkes Shire Council* establish that Art 17 of the Montreal Convention provides the exclusive means of establishing civil liability of a carrier in respect of personal injury suffered by a passenger in the course of international carriage by air. It submits that the authorities have consistently emphasised that to allow claims outside of the scope of the Montreal Convention to be brought under domestic law would undermine the purpose of the Montreal Convention, which it contends is to achieve uniformity and a code by which such claims can be made, reflecting an appropriate balance between the interests of a carrier and the rights of passengers.

F.3.2. The applicants' submissions

76 The applicants submit that, properly understood, the exclusivity principle only extends to exclude claims in negligence under domestic law that relate to acts or omissions for which the Montreal Convention provides a remedy. They submit it is therefore only acts or omissions of an airline, while an aircraft is in flight or in the course of the operations of embarking or disembarking passengers, that are subject to the exclusivity principle (**narrow construction**).

77 The applicants contend that the analyses of both Lord Hope of Craighead in *Sidhu* and Gordon J in *Parkes Shire Council* left open the possibility that a passenger could bring, under domestic law, an action for damages with respect to an act or omission outside the scope of Art 17, and that dicta statements in *Tseng*, *King* and *Stott* provide support for the narrow construction.

F.4. Consideration

78 It is necessary to distinguish between an accident that occurred onboard an aircraft or in the course of the operations of embarking or disembarking, and a claim for damages for an injury that occurred during the international carriage of a passenger by air.

79 My conclusion that the accident alleged by the applicants did not occur on the aircraft or in the course of the operations of embarking or disembarking the aircraft does not carry with it any necessary implication that the claims for damages advanced by the applicants against Qatar Airways did not concern injuries sustained during their international carriage by air.

80 In my view, the particulars provided by the applicants for their claims for damages against Qatar Airways are all directed at acts or omissions of Qatar Airways that occurred onboard the aircraft, in the course of the operations of disembarking or embarking the aircraft or in an ambulance on the tarmac. At the time that the invasive examinations in the ambulance were conducted, the international carriage of the applicants by air had not ceased. The applicants had passed through passport control and pre-boarding security, their luggage had been loaded and remained on the aircraft, they had not reached their intended destination nor had they passed back through passport control.

81 The critical issue is whether the exclusivity principle extends to any personal injury suffered by a passenger in the "course of international carriage by air" or only to injuries that would fall within the scope of Art 17(1) of the Montreal Convention. If the narrow construction propounded by the applicants is correct, the exclusivity principle would only apply to injuries

sustained "on board the aircraft or in the course of any of the operations of embarking or disembarking" the aircraft.

82 I am satisfied for the following reasons that the broader construction advanced by Qatar Airways is correct and there is no substantive support in any of the relevant authorities for the narrow construction propounded by the applicants.

83 *First*, there is no textual support in Art 29 for any limitation on the breadth of the exclusivity provision. The language is not qualified. It is directed at "any action for damages, however founded" and concerns any action for damages "whether under this Convention" or "in contract or in tort" or "otherwise" and provides that such actions can "only be brought" subject to the conditions and such limitations of liability as are set out in the Montreal Convention.

84 *Second*, not reading down the breadth of the text of Art 29 is consistent with the object and purpose of the Warsaw Convention and Montreal Convention.

85 The speech of Lord Hope of Craighead in *Sidhu* provides the most authoritative statement of the scope of the exclusivity principle in the context of the object and purpose of the Warsaw Convention (and subsequently the Montreal Convention).

86 The appellants in *Sidhu* were passengers on a British Airways flight from London to Kuala Lumpur via Kuwait. The flight landed in Kuwait early on the morning of the Iraqi invasion of Kuwait. Some of the passengers were permitted to leave the aircraft and went to the transit lounge. Shortly afterwards the airport was attacked and the passengers in the transit lounge, who included the appellants, were detained by Iraqi military forces for a period of 20 days.

87 The appellants had variously brought actions against British Airways in England, as plaintiffs, and in Scotland, as pursuers. In the action commenced in England, the plaintiffs sought damages against British Airways at common law for personal injuries and negligence. In the Scottish action, the pursuers sought damages for delay under Art 19 of the Warsaw Convention and in the alternative at common law for breach of an implied term of the contract for carriage that British Airways would take reasonable care for their safety.

88 The alleged breaches of duty by British Airways took place in the air prior to the aircraft's arrival in Kuwait but the appellants accepted that they did not have a claim against British Airways under Art 17 of the Warsaw Convention. The appellants also accepted that although their apprehension by the Iraqi security forces took place in the airport terminal in Kuwait, it was relevantly still in the course of international carriage by air because they were still in transit

to their ultimate destination in Malaysia. Lord Hope of Craighead did not consider it necessary to explore the reasons why the appellants had taken the view that Art 17 did not provide a remedy for the appellants. His Lordship, however, noted that in the English action the plaintiffs had conceded in the Court of Appeal that no accident causing damage had taken place on board the aircraft or in the course of disembarkation.

89 In that case the appellants accepted that their claims arose during international carriage by air but they did not have claims under Art 17 of the Warsaw Convention (apparently on the bases that there was no "accident" and no "bodily injury"): *Sidhu* at 440-441. In those circumstances, Lord Hope of Craighead, with whom the rest of their Lordships agreed, held that the Warsaw Convention provided "the exclusive cause of action and remedy" in respect of actions for damages for personal injury "sustained in the course of, or arising out of, international carriage by air": *Sidhu* at 437, and see 441, 447. His Lordship stated at 447:

> To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention.

90 *Third*, neither *Sidhu* nor *Parks Shire Council* leaves open the possibility that an action for damages with respect to an act or omission that occurred in the course of international carriage by air can be advanced outside the scope of Art 17.

91 In *Parkes Shire Council* the High Court considered whether a claim in tort for psychiatric harm arising from the death of a passenger during air carriage to which Pt IV of the CACL Act applied was precluded by that Act. Section 28 of the CACL Act mirrors Art 17 of the Warsaw Convention and Art 17(1) of the Montreal Convention, and s 35(2) of the CACL Act mirrors the exclusivity provision in Art 24 of the Warsaw Convention and Art 29 of the Montreal Convention.

92 In considering the proper construction of s 28 and s 35(2) of the CACL Act, the High Court in *Parkes Shire Council* at [10] placed particular emphasis on the reasoning of Lord Hope of Craighead in *Sidhu* in addressing Art 17 and Art 24 of the Warsaw Convention.

93 The plurality (Kiefel CJ, Bell, Keane and Edelman JJ) observed that s 28 of the CACL Act implemented Art 17 of the Warsaw Convention by creating a liability that was "distinct from any liability that might arise under domestic law" and stated at [16]:

> It is that liability that s 28 creates which s 35(2) substitutes "for *any* civil liability of the carrier under *any* other law in respect of the death of the passenger" (emphasis added). The substitution so effected is clearly intended to be comprehensive.

94 The plurality was specifically addressing the death of a passenger but s 36 of the CACL Act is relevantly in substantially the same terms as s 35(2) with respect to a personal injury to a passenger that did not result in the death of the passenger.

95 The plurality noted at [20] that at first instance, the primary judge had concluded that he was bound by the decision of the Full Court of this Court in *South Pacific Air Motive Pty Ltd v* ***Magnus*** (1998) 87 FCR 301, to find that the claims in tort for negligently inflicting psychological harm were not extinguished by the temporal limit imposed by s 34 on the availability of a cause of action created by s 28 of the CACL Act. The Full Court in *Magnus* (Sackville J, Hill J agreeing and Beaumont J dissenting) found that claims for psychiatric injury by non-passengers were outside the scope of Pt IV of the CACL Act and hence were not time barred: *Parkes Shire Council* at [21].

96 The plurality considered at [24] that the following statement by Beaumont J in *Magnus* at [33] better accorded with the approach of the House of Lords in *Sidhu*:

> It is apparent that Pt IV was intended to operate exclusively, as a code, in the event of the death or personal injury of a passenger in an aircraft accident. In that area, Pt IV provides some benefits not available under the general law, yet is also restrictive of the rights of a plaintiff at common law in some respects.

97 The plurality stated at [25]:

> Beaumont J was rightly focused upon the evident intention of the CACL Act to create uniform and exclusive rules as to the liability of a carrier for events involving injury to or the death of passengers in accordance with the intent of the Warsaw Convention.
>
> (Footnote omitted.)

98 The plurality emphasised that the "cardinal purpose" of the CACL Act in giving effect to the Warsaw Convention was to "achieve uniformity in the law relating to liability of air carriers, so that, in those areas with which the Convention deals, it contemplates a uniform code that excludes resort to domestic law": *Parkes Shire Council* at [36].

99 Justice Gordon came to the same conclusion as the plurality. Her Honour stated at [71], in a sentence emphasised in the applicants' submissions at [57]:

> Article 24 of the Warsaw Convention gives effect to what has been described as the "exclusivity principle" – that a claim falling within, relevantly, Art 17 "can only be brought subject to the conditions and limits set out in [the] Convention". That, in turn, directs attention to the scope of Art 17.

100 Contrary to the submissions of the applicants, I do not accept that these statements can be construed as Gordon J finding "merely that where there is a claim falling within the scope of Art 17, that article provides the exclusive basis for the carrier's liability". Such a proposition is not possible to reconcile with her Honour's subsequent reference and approval of the analysis of Lord Hope of Craighead in *Sidhu*. Her Honour in that context, stated at [73]:

> If the basis of the claim satisfies the terms of Art 17, the liability of the carrier is limited to that provided by the terms of the applicable convention. On the other hand, if there is no claim within the terms of Art 17, there is no remedy. As Lord Hope of Craighead explained in *Sidhu v British Airways Plc*, the whole purpose of Art 17, read in context, was to prescribe the only circumstances in which a carrier would be liable to the passenger for claims arising out of that person's international carriage by air. That principle has been applied in the United States, Hong Kong, Canada and New Zealand, amongst other jurisdictions.
>
> (Footnotes omitted.)

101 This passage from her Honour's reasons makes clear that the reference to "no claim within the terms of Art 17" was not a reference to a claim that fell within Art 17, but for which Art 17 did not provide a remedy. Rather, her Honour was stating that Art 17 prescribed the only circumstances in which a carrier could be liable to a passenger for any claim "arising out of that person's international carriage by air".

102 Those statements of principle by the High Court in *Parkes Shire Council* were made in the context of a different but related question to that considered in *Sidhu* and that arises in the present case. Nevertheless, they were considered statements of principle that were a necessary step in the reasoning of both the plurality and Gordon J. To the extent that they might be suggested not to be binding given the different question addressed in *Parkes Shire Council* and thereby only in the character of obiter dicta statements, Jackman J recently emphasised in *DC Rd DC Pty Ltd v Zhang (No 3)* [2024] FCA 221 at [35]:

> [T]he High Court has held that intermediate appellate courts and trial judges in Australia should not depart from long-established authority and seriously considered *dicta* of a majority of the High Court: *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22; (2007) 230 CLR 89 at [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). That proposition contains two requirements, namely that the dicta conform with long-established authority and be the dicta of a

> majority of the High Court: *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 at [473] (Heydon J); *Harvard Nominees Pty Ltd v Tiller* [2020] FCAFC 229; (2020) 282 FCR 530 at [54] (Lee, Anastassiou and Stewart JJ), citing Perry Herzfeld and Thomas Prince, *Interpretation* (Lawbook Co, 2nd ed, 2020) at [33.320].

103 Both requirements are met here. The statements of principle were made by all members of the High Court in *Parkes Shire Council*, and they conformed with long established authority commencing with *Sidhu*.

104 *Fourth*, the analysis undertaken by Lord Hope of Craighead in *Sidhu* has been approved and followed in other appellate decisions of courts around the world, including in both Australia and in the United States.

105 The Court of Appeal of the New South Wales Supreme Court in *United Airlines v Sercel* (2012) 289 ALR 682; [2012] NSWCA 24 at [96] (Allsop P, with whom McFarlan JA and Handley AJA agreed) stated that *Sidhu*:

> … can be accepted fully for what it decided: that from a consideration of the whole purpose of the Warsaw Convention, it can be taken to prescribe the circumstances, being the only circumstances, in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air. No other action was available to the passenger.

106 After quoting from the analysis undertaken by Lord Hope of Craighead at 447, Allsop P said at [96]-[98]:

> His Lordship was speaking of the unity and comprehensiveness of the actions given by the Warsaw Convention to the passenger (extending also to wrongful death claims). Those actions were given to the passenger, all others were removed from him or her and those that were given were subject to the conditions and limits of the convention.
>
> The same approach was taken by the United States Supreme Court in *El Al Israel Airlines*. The rights of the passenger to damages were exclusively to be found in the Warsaw Convention. One did not have access to state law if one fell outside Art 17. The court viewed the Warsaw Convention as intended to give airlines the protection of actions provided for under Art 17 when read with Art 24 (to passengers and those claiming in respect of death under national law) being the only actions those people could bring.

107 This expression of the matter by both the House of Lords and the Supreme Court reflects Australian law, though Australian statute law may go further: see s 9D(2), s 9E, s 12(2), s 13, s 24, s 25L, s 35(2) and s 36 of the CACL Act, which make the causes of action provided for a complete substitute for any civil liability of the carrier in respect of the injury or death of a passenger.

108 *Fifth*, the statements relied upon by the applicants in each of *Tseng*, *King* and *Stott* do not provide any substantive support for the narrow construction.

109 In each case, it was accepted that the relevant event was in the course of embarking or in the course of flight and therefore the event fell within the scope of Art 17 and the exclusivity principle therefore clearly applied. The applicants, however, sought to derive support from the following dicta observations.

110 In *Tseng*, Justice Ginsburg, who gave the opinion of the United States Supreme Court, referred with approval to the amicus curiae submissions of the United States government at 172:

> "[T]he Convention's preemptive effect on local law extends no further than the Convention's own substantive scope." A carrier, therefore, "is indisputably subject to liability under local law for injuries arising outside of that scope: e.g., for passenger injuries occurring before 'any of the operations of embarking'" or disembarking.
>
> (Footnotes omitted.)

111 Any support that the reference to "injuries outside of that scope" might be thought to provide for the narrow construction is negated when one has regard to the wording of the exclusionary provision the subject of that statement. Article 24 relevantly provided at that time that:

> 1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> 2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

112 Justice Ginsburg, however, observed at 174-175, in response to a submission that subsequent revisions to Art 24 provided for pre-emption that had not previously existed:

> Montreal Protocol No. 4, ratified by the Senate on September 28, 1998, amends Article 24 to read, in relevant part: "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 this Convention . . . ." Both parties agree that, under the amended Article 24, the Convention's preemptive effect is clear: The treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty. Revised Article 24, El Al urges and we agree, merely clarifies, it does not alter, the Convention's rule of exclusivity.
>
> (Footnotes omitted.)

113 The significance of these observations is that the revisions made to Art 24(2) of the Warsaw Convention, by Montreal No 4 removed the qualification provided by the words "[i]n the cases covered by Art17 the provisions of the preceding paragraph also apply" and replaced them with an unrestricted reference to "the carriage of passengers and baggage".

114 In *King*, the Court of Appeals relevantly noted that in determining whether events giving rise to a claim occurred within the course of the international carriage of passengers, it was necessary to look to the Warsaw Convention's liability provisions in order to construe the "substantive scope" of the Warsaw Convention: *King* at 358. The Court of Appeals further observed at 360-361:

> Article 17 directs us to consider *when* and *where* an event takes place in evaluating whether a claim for an injury to a passenger is preempted. Expanding upon the hypothetical posed by the *Tseng* Court, a passenger injured on an escalator at the entrance to the airport terminal would fall outside the scope of the Convention, while a passenger who suffers identical injuries on an escalator while embarking or disembarking a plane would be subject to the Convention's limitations. *Tseng*, 525 U.S. at 171, 119 S.Ct. 662. It is evident that these injuries are not qualitatively different simply because they have been suffered while embarking an aircraft, and yet Article 17 plainly distinguishes between the two situations.
>
> (Footnote omitted.)

115 In *Stott*, Lord Toulson, with whom the other Justices of the Supreme Court of Appeal agreed, noted that if the claimant had a complete cause of action before boarding the aircraft, "it would of course follow that such a pre-existing claim would not be barred by the Montreal Convention": *Stott* at [60].

116 These statements, however, do not assist in construing the phrase "in the course of international carriage by air". In each statement an event was identified by way of distinction that occurred *prior* to any international carriage by air. The events were variously described as an injury prior to embarkation (*Tseng*), an accident on an escalator at the entrance to an airport terminal (*King*) or a complete cause of action before boarding an aircraft (*Stott*). None of the statements were directed at an event that occurred in the course of the international carriage by air. In each case the international carriage by air had not yet begun, as each was prior to any process of embarkation. Entering an airport terminal cannot be equated with embarking on an aircraft.

G. RELEVANT LEGAL PRINCIPLES FOR SUMMARY JUDGEMENT AND RELATED CLAIMS

G.1. Overview

117 The legal principles governing the adequacy of pleadings, summary judgment, strike out and setting aside service applications are well settled and were not in dispute. It is sufficient for present purposes to provide the following summary of the relevant statutory provisions, rules and principles.

G.2. Pleadings

118 Rule 16.02(1)(d) of the Rules provides that a pleading must:

> (d) state the material facts on which a party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial, but not the evidence by which the material facts are to be proved;

119 The pleading of material facts is important not only to provide a structure for a proceeding but also to give an opposing party fair notice of the case that it has to meet and thereby minimise the risk of injustice by taking the opposing party by surprise: *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356; [2010] FCAFC 133 at [50] (Keane CJ, Lander and Buchanan JJ).

120 The Rules do not include any definition of a material fact. In addressing the meaning to be given to "material" in the context of cognate provisions in the *Supreme Court Rules 1970* (NSW), the Court of Appeal said in *Kirby v Sanderson Motors Pty Ltd* (2001) 54 NSWLR 135; [2002] NSWCA 44 at [20] (Hodgson JA with Mason P and Handley JA agreeing):

> It might appear that these rules do not require that causes of action be stated in pleadings: the requirement is to have a statement of material facts, and indeed to have only such a statement. However, in my opinion —
>
> > (1) "Material" means material to the claim, that is, to the cause or causes of action which are relied on.
> >
> > (2) The requirement of a statement of material facts does not exclude the allegation of legal categories, such as duty of care, fiduciary duty, trust and contract.
> >
> > (3) The general requirement to avoid surprise means that material facts must be stated in such a way that a defendant can understand the materiality of the facts, that is, how they are material to a cause of action.

121 The pleading of a conclusion may be sufficient in some circumstances to constitute a material fact, but a pleading may be embarrassing if allegations are made at such a level of generality that a respondent does not know in advance the case it has to meet: *McGuirk v University of New South Wales* [2009] NSWSC 1424 at [33] (Johnson J), citing *Charlie Carter Pty Ltd v Shop Distributive and Allied Employees Association of Western Australia* (1987) 13 FCR 413 at 417-418 (French J). In a much cited passage, Johnson J stated:

> 33. Although the pleading of a conclusion may, in some circumstances constitute a material fact, nevertheless, the pleading will be embarrassing if allegations are made at such a level of generality that the defendant does not know in advance the case it has to meet: *Charlie Carter Pty Ltd v Shop Distributive and Allied Employees Assn* (1987) 13 FCR 413 at 417–418. In such a case, the appropriate remedy is to strike out the pleading rather than to order the

> provision of particulars, as it is not the function of particulars to take the place of the necessary averments in a pleading: *Trade Practices Commission v David Jones (Aust) Pty Ltd* (1985) 7 FCR 109 at 112–114. Rule 14.28 UCPR provides that pleadings that involve non-compliance are liable to be struck out as an embarrassment. However, generally the courts recognise that a wide range of discretionary considerations arise where there is a failure to comply with the technical requirements of the pleading rules: Beach Petroleum NL v Johnson (1991) 105 ALR 456 at 466. In many instances, the appropriate order may be to strike out the offending pleading, but grant leave to amend: *Rubenstein v Truth & Sportsman Ltd* [1960] VR 473 at 476; *H 1976 Nominees Pty Ltd v Galli* (1979) 30 ALR 181 at 186.

122 As the High Court explained in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486; [2012] HCA 39 at [27] (French CJ, Gummow, Hayne and Kiefel JJ):

> The task of the pleader is to allege the facts said to constitute a cause of action or causes of action supporting claims for relief. Sometimes that task may require facts or characterisations of facts to be pleaded in the alternative. It does not extend to planting a forest of forensic contingencies and waiting until final address or perhaps even an appeal hearing to map a path through it. In this case, there were hundreds, if not thousands, of alternative and cumulative combinations of allegations. As Keane CJ observed in his judgment in the Full Court (at [16]):
>
> > [16] The presentation of a range of alternative arguments is not apt to aid comprehension or coherence of analysis and exposition; indeed, this approach may distract attention from the central issues.
>
> (Footnotes omitted.)

G.3. Summary judgment

123 Section 31A(2) of the Federal Court Act provides:

> (2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
>
> > (a) the first party is defending the proceeding or that part of the proceeding; and
> >
> > (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

124 In the usual course, a party should not be denied the opportunity to have their case determined by the Court in the ordinary way, after taking advantage of the usual interlocutory processes: ***Spencer*** *v Commonwealth* (2010) 241 CLR 118; [2010] HCA 28 at [24] (French CJ and Gummow J), citing ***Agar*** *v Hyde* (2000) 201 CLR 552; [2000] HCA 4 at [57] (Gaudron, McHugh, Gummow and Hayne JJ).

125 As the Full Court of this Court emphasised in *Danthanarayana v Commonwealth* [2016] FCAFC 114 at [4] (Jagot, Bromberg and Murphy JJ):

> [T]o summarily dismiss a proceeding, and thereby preclude a person from having their case determined on its merits at a final hearing, is a serious step taken only with great care and if it is possible to conclude with confidence that there is no reasonable prospect of success; this is so despite the fact that under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (the **Court Act**) the power to summarily dismiss a proceeding is not dependent on the case being "hopeless" or "bound to fail" for it to have no reasonable prospect of success (*Spencer v Commonwealth* [2010] HCA 28; (2010) 241 CLR 118 at [17]-[26]).

126 Cases involving complex issues of law and fact or mixed issues of law and fact are unlikely to be appropriate for resolution by summary judgment: *Spencer* at [26], citing *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1 at [95] (Lord Hope).

127 The standard imposed by s 31A of the Federal Court Act, however, is lower than the standard for strike-outs imposed by the High Court in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69, namely that allegations are "manifestly groundless" or "obviously untenable": *Hicks v Ruddock* (2007) 156 FCR 574; [2007] FCA 299 at [12] (Tamberlin J). A proceeding or a part of a proceeding need not be hopeless or bound to fail for it to have no reasonable prospects of success: s 31A(3) of the Federal Court Act.

128 Section 31A of the Federal Court Act permits dismissal of a proceeding where an inquiry into the merits of the legal issues raised demonstrates that the arguments are insufficiently strong to warrant the matter going to trial: *McAleer v University of Western Australia (No 3)* (2008) 171 FCR 499; [2008] FCA 1490 at [39] (Siopis J), citing *Bradken Resources Pty Ltd v Lynx Engineering Consultants Pty Ltd* [2008] FCA 1257 at [28] (Emmett J).

129 Proceedings may be summarily dismissed pursuant to s 31A where the pleadings disclose no reasonable cause of action and their deficiency is incurable, or in circumstances where there is unanswerable or unanswered evidence of a fact fatal to the pleaded case and any case which might be propounded by permissible amendment: *Spencer* at [22] (French CJ and Gummow J). Their Honours further explained that s 31A(2) requires "a practical judgment by the Federal Court as to whether the applicant has more than a "fanciful" prospect of success": *Spencer* at [25].

130 In *Australian Securities and Investments Commission v* ***Cassimatis*** (2013) 220 FCR 256; [2013] FCA 641, Reeves J stated that the Court does not conduct "a mini-trial based upon incomplete evidence to decide whether the proceedings are likely to succeed or fail at trial", rather the determination of a summary dismissal application requires a "critical examination of

the available materials to determine whether there is a real question of law or fact that should be decided at trial": *Cassimatis* at [46].

131 His Honour then stated that, as a general principle, an application for summary dismissal is likely to succeed if the proceeding relies on a question of fact that can be characterised as "fanciful, trifling, implausible, improbable, tenuous or one that is contradicted by all the available documents or other materials": *Cassimatis* at [47]. His Honour also stated that, conversely, an application is unlikely to succeed where the available materials included pleadings that raised factual disputes that could be "truly described as significant, substantial, plausible or weighty": *Cassimatis* at [47].

132 Once a moving party has established a prima facie case that their opponent has no reasonable prospects of success, the opposing party must respond by pointing to specific factual or evidentiary disputes that make a trial necessary. Responding with general or non-particularised denials will not be sufficient to defeat the application: *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* (2008) 167 FCR 372; [2008] FCAFC 60 at [127] (Gordon J); *Fair Work Ombudsman v Austrend International Limited Pty Ltd* (2018) 273 IR 439; [2018] FCA 171 at [14] (Gilmour J); *ThoughtWare Australia Pty Limited v IonMy Pty Ltd* [2023] FCA 906 at [50(f)] (Derrington J).

G.4. Strike out application

133 Rule 16.21(1) of the Rules provides:

> (1) A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:
>
> (a) contains scandalous material; or
>
> (b) contains frivolous or vexatious material; or
>
> (c) is evasive or ambiguous; or
>
> (d) is likely to cause prejudice, embarrassment or delay in the proceeding; or
>
> (e) fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or
>
> (f) is otherwise an abuse of the process of the Court.

134 The Full Court of this Court in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2017] FCAFC 50 at [44] (Greenwood, Flick and Rangiah JJ) succinctly stated the

principles governing the Court's exercise of its discretion to strike out pleadings. Those principles can be summarised as follows:

(a) great caution should be exercised before striking out a party's pleaded case and thereby potentially placing an impediment in the path to the vindication of a claim for relief by exposing a party to the prospect of being unfairly denied access to the courts;

(b) greater uncertainty, perhaps, surrounds those circumstances in which a party may be exposed to the prospect of unfairness by being confronted with a deficiently pleaded case, by way of example, if the pleading is accepted to be sufficiently ambiguous or uncertain such that it should be struck out;

(c) where any unfairness may be addressed by the provision of further particulars or evidence, the discretion may be exercised to permit such a case to proceed to hearing notwithstanding non-compliance with r 16.02 of the Rules;

(d) there would need to be a reason why a claim which is accepted to be inadequately pleaded should proceed to hearing without any potential unfairness to the opposing party being adequately addressed;

(e) a pleading should adequately place an opposing party in a position where it fairly knows the case to be met; and

(f) ultimately, pleadings, are the "servants, not the masters of the judicial process": *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677 at 687; [1997] HCA 21 (Kirby J).

135 Leave to replead will be refused if the Court takes the view that no reasonable amendment can cure the alleged defect and if there is no reasonable question to be tried: *Crowley v WorleyParsons Ltd* [2017] FCA 3 at [61] (Foster J), citing *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* (2012) 203 FCR 325; [2012] FCAFC 97 at [43] (Perram, Dodds-Streeton and Griffiths JJ).

G.5. Discretion to set aside service

136 Rule 10.43A of the Rules provides:

> (1) On application by a person on whom an originating application has been served outside Australia, the Court may dismiss or stay the proceeding or set aside service of the originating application.
>
> (2) Without limiting subrule (1), the Court may make an order under this rule if satisfied that:
>
> (a) service of the originating application is not authorised by these Rules; or

(b) Australia is an inappropriate forum for the proceeding; or

(c) the claim has insufficient prospects of success to warrant putting the person served outside Australia to the time, expense and trouble of defending it.

137 The rule was introduced by the *Federal Court Legislation Amendment Rules 2022* (Cth) which, amongst other matters, amended the Rules to allow service of an originating application outside of Australia without the Court's leave in certain cases: see r 10.42 of the Rules.

138 The grounds on which such an order can be made include, relevantly, where the Court is satisfied that "the claim has insufficient prospects of success to warrant putting the person outside Australia to the time, expense and trouble of defending it": r 10.43A(2)(c) of the Rules.

139 It has been held under the analogous State rules, that in setting aside an originating process on this ground, the Court applies the same test as would be applied on an application for summary judgment by a respondent served locally: *Agar* at [56]-[60] (Gaudron, McHugh, Gummow and Hayne JJ). In my view, that approach is equally applicable to r 10.43A(2)(c) of the Rules and therefore the summary judgment principles outlined at [124]-[132] above are to be applied.

H. NEGLIGENCE CLAIMS AGAINST QATAR AIRWAYS AND MATAR

H.1. Overview

140 My conclusion that the exclusivity principle precludes the applicants from pursuing any claim for damages against Qatar Airways is a complete answer to the claims that the applicants seek to bring against Qatar Airways.

141 As Qatar Airways submits, the negligence claim arises from the factual premise that it owed duties to the applicants arising in the course of their international carriage by air for reward. Each of the particulars concerned actions that it failed to do while the applicants were on the aircraft, within the terminal, or on the tarmac and therefore each related to some aspect of the international carriage of the applicants by air. The exclusivity principle in the Montreal Convention therefore precludes the applicants advancing this claim and it must therefore be summarily dismissed or struck out.

142 Nevertheless, in the event that I am mistaken in that conclusion and because that finding only precludes claims against Qatar Airways, I now turn to the negligence claims advanced against Qatar Airways and MATAR.

H.2. Legal principles

143 In order to have a cause of action in negligence, it is necessary to establish the existence of a duty of care and a breach of that duty of care, together with actual damage or injury and causation: ***Harriton*** *v Stephens* (2006) 226 CLR 52; [2006] HCA 15 at [218] (Crennan J with whom Gleeson CJ and Gummow and Heydon JJ agreed).

144 In *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; [2009] NSWCA 258 at [101]-[102], Allsop P noted that the rejection by the High Court of any particular formula or methodology or test that would identify in any given circumstance whether a duty of care might arise, and if so, its scope and content, has been accompanied by:

> the identification of an approach to be used to assist in drawing the conclusion whether in novel circumstances the law imputes a duty and, if so, in identifying its scope or content. If the circumstances fall within an accepted category of duty, little or no difficulty arises. If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.

145 The salient features identified by Allsop P at [103], included the foreseeability of the harm, the nature of the harm alleged, the degree and nature of control able to be exercised by the defendant to avoid harm, the nature of the activity undertaken by the defendant and any knowledge by the defendant that the conduct would cause harm to the plaintiff.

146 A duty of care expressed as a "duty to warn" is more accurately expressed as a standard of care at the breach stage rather than whether a duty of care exists in those terms: ***Vairy*** *v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62 at [29] (McHugh J).

147 It is only in exceptional circumstances that a duty to control another person's actions will arise: *Smith v Leurs* (1945) 70 CLR 256 at 262; [1945] HCA 27 (Dixon J). Exceptional circumstances may include where an occupier of premises with control of access to those premises has knowledge (either constructive or actual) of a real potential for third party criminal conduct: ***Karpik*** *v Carnival plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280 at [534] (Stewart J) and the cases cited. Generally, whether a duty of care exists or not is expressed at a higher level of abstraction than questions of breach: *Harriton* at [226] (Crennan J with whom Gleeson CJ and Gummow and Heydon JJ agreed) and at [70] (Kirby J).

148 The duty of care in negligence in cases of personal injury is always expressed in terms of reasonable care, "the duty is always the same – to conform to the legal standard of reasonable

conduct in the light of the apparent risk": *Vairy* at [25] (McHugh J), citing *Prosser and Keeton on the Law of Torts*, 5th ed, West Publishing Co, St Paul, 1984, p 356.

I. NEGLIGENCE CLAIMS AGAINST QATAR AIRWAYS

I.1. The pleaded negligence claims

I.1.1. Duty of care

149 The duty of care alleged to be owed by Qatar Airways is pleaded in the proposed 2FASOC at [33]:

> The First Respondent owed each of the Applicants a duty of care to take all reasonable steps to avoid or minimise the risk of the Applicants suffering harm during the course of flight QR908 including in the Doha Airport terminal embarking or disembarking the aircraft, on the Doha Airport tarmac, and throughout the flight.

150 The duty of care is alleged to include a duty of care to avoid or minimise the risk of the applicants suffering harm on the tarmac of the Doha Airport. The harm from which Qatar Airways is alleged to have a duty of care to avoid or minimise the risk of is not specifically identified. Nor is there any identification of the "reasonable steps" that Qatar Airways and MATAR were required to take to comply with those duties.

I.1.2. Breach of duty

151 The alleged breach by Qatar Airways of its duty of care is pleaded in these terms, in the proposed 2FASOC at [34]:

> By reason of the events described at paragraphs 12 to 21 above, and in circumstances where its corporate subsidiary, the Third Respondent, was the contracted manager and operator of the Doha Airport, the First Respondent breached its duty of care to each of the Applicants.

152 It is not readily apparent how MATAR's position as the contracted manager and operator of the Doha Airport is relevant to any asserted breach of Qatar Airways' alleged duty of care. The applicants do not plead or particularise the basis upon which they contend that the scope of Qatar Airways' duty of care is informed by or in any way expanded by the position of its corporate subsidiary, MATAR.

153 The applicants rely on the following particulars in support of the alleged breach of duty by Qatar Airways:

> (i) By failing to take any or adequate steps to ascertain the reason for any direction, request or requirement that female passengers exit the aircraft;
>
> (ii) Alternatively, by directing that all female passengers exit the aircraft, knowing

that the female passengers would be exposed to the risk of invasive intimate inspections or examinations;

(iii) Alternatively, by directing that all female passengers exit the aircraft, being reckless as to the reason for making that direction and;

(iv) By announcing that all female passengers were required to exit the aircraft, regardless of the age or health of these passengers and regardless of whether they were accompanied by infant children;

(v) By failing to provide the Applicants with any or any adequate explanation as to why they had to exit the aircraft and;

(vi) By directing the Applicants from the aircraft to a departure lounge within the Doha Airport terminal;

(vii) By directing the Fifth Applicant into a lift and down to a lobby near the tarmac;

(viii) By failing to take any or adequate steps to prevent the First to Fourth Applicants from being directed onto the tarmac and into the ambulance;

(ix) By failing to take any or adequate steps to prevent the First to Fourth Applicants from being subjected to an intimate examination or inspection; and/or

(x) By failing to take any or adequate steps to prevent the Fifth Applicant from being directed onto the tarmac and towards the ambulance[.]

I.1.3. Causation

154 The applicants' causation case is pleaded in the proposed 2FASOC at [35], in the following terms:

> By reason of the First Respondent's breach of duty, each of the Applicants has suffered and continues to suffer loss and damage.

155 No material facts are alleged and no particulars are provided as to how the alleged breaches of duty led to the loss and damage suffered by the applicants.

I.1.4. Loss and Damage

156 The applicants seek both general and exemplary damages in the same terms against each of the respondents.

157 The following particulars of general loss and damage are provided in the proposed 2FASOC at [45]:

(i) The First, Third and Fourth Applicants were subjected to unlawful physical contact.

(ii) Each of the Applicants has suffered and/or continues to suffer from anxiety, depression, Post Traumatic Stress Disorders (PTSD), and/or other psychological effects.

(iii) The Applicants have incurred medical expenses.

(iv) The First Applicant has suffered economic loss as a result of needing to take medical leave from work due to the effects of the events on her mental health.

(v) Further particulars of damage will be provided following evidence.

158 The applicants provide the following particulars of the facts on which they advance a claim for exemplary damages against each of the respondents in the proposed 2FASOC at [46]:

(i) The Applicants were not provided with any or any adequate explanation as to why they had to exit the aircraft.

(ii) The Applicants were directed about by armed and unarmed persons despite being cooperative with requests or requirements that they exit the aircraft and move through Doha Airport.

(iii) The First, Second, Third and Fourth Applicants were subjected to intimate gynaecological examinations or inspections to which they did not consent.

(iv) The Third Applicant was subjected to the treatment described above at paragraphs 12 to 16 and 19(a) to 19(c) above, despite her, at the time, turning 52 years of age.

(v) The Fourth Applicant was subjected to the treatment described above at paragraphs 12 to 15 and 20(a) to 20(e) above, despite her being in the company of her five-month-old son.

(vi) The Fifth Applicant, as described above at paragraphs 12 to 16 and 21(a) to 21(c) above, was directed, including by members of Qatar Airways flight crew and by armed persons, off the aircraft, through the airport terminal and onto the tarmac towards the ambulance, despite her being, at the time, 73 years old and legally blind.

(vii) The Applicants were subjected to the treatment described above at paragraphs 12 to 21, despite being paying passengers on a commercial flight wholly innocent of the matter described at paragraph 9 above.

I.2. Submissions on negligence case against Qatar Airways

I.2.1. Qatar Airways' submissions

159 Qatar Airways submits that the negligence claim against it has no reasonable prospects of success. It submits that the claim as pleaded is bad at law and should be summarily dismissed.

160 It submits that to the extent that the negligence claims rely on the contention that MATAR, as the operator of the Doha Airport, was directing or controlling the MOI officers or the nurse in the ambulance, this contention is contradicted by unanswerable or unanswered evidence of facts.

161 Further, Qatar Airways submits that to the extent that the negligence claims rely on the contention that it owed a duty to prevent the MOI from undertaking its police operation, this contention has no reasonable prospects of success for the following reasons.

162 *First*, the duty asserted by the applicants would impose a positive duty on Qatar Airways to act where it had not contributed to the alleged risk of injury. It submits that only where a special relationship exists, would the Court impose a duty to take steps to prevent harm befalling another person.

163 *Second*, the imposition of a duty to take steps to prevent or persuade the armed MOI police officers from carrying out the police operation would necessarily put Qatar Airways and MATAR in breach of the law of Qatar and potentially expose them to harm. It submits it is not a duty known to law. Further, it submits it would impose a duty to take steps that were incompatible with other duties that Qatar Airways owed. These duties included an obligation not to interfere with a public officer in the exercise of their duties, a breach of which duty is an offence under the Qatar Penal Code, in particular, Art 167 and 168 of the Qatar Penal Code.

164 *Third*, no material facts are alleged that could provide any basis to conclude that the alleged breaches of duty caused the applicants any loss or damage. Relatedly, Qatar Airways submits it is entirely unclear what steps it, or a reasonable person in its position, could have taken to prevent the MOI from undertaking a law enforcement operation. That being the case, Qatar Airways also submits the claim fails at the level of breach.

I.2.2. The applicants' submissions

165 The applicants submit that the negligence claims raise complex questions of fact and law that are not fanciful. They submit this would include when and where each of the asserted failures occurred and when each of the applicants suffered loss.

166 The applicants submit that the negligence claims have reasonable prospects for success. They advance the following submissions in support of their negligence claims against Qatar Airways.

167 *First*, they submit that it is not "straightforward and confined" or "trite" that the law would not recognise that Qatar Airways owed them a duty of care. They submit that (a) although the common law does not generally impose any duty on a person to take steps to prevent harm, this begs the question of whether the relationship between a carrier for reward and the applicants, was such as to give rise to a duty of care, (b) the duty of care owed by Qatar Airways would extend to at least a duty to take all reasonable precautions for the safety of their

passengers including against dangers for which at least some precautions can be taken, and (c) under the Qatar Penal Code it was only an offence to use "force", "violence" or "menace" to resist or prevent a public officer exercising their "legally assigned duty" or the "duties of their office". They submit that it is no part of their case that any force should have been used by Qatar Airways against MOI police officers and in any event, the principle does not extend to actions beyond a police officer's lawful conduct such as actions amounting to sexual assault or other unlawful conduct.

168 *Second*, they submit that the alleged breaches of duty raise factual questions that are properly to be determined at trial. These include the extent of the involvement of the Qatar Airways flight crew in the disembarkation of the applicants from the aircraft, whether there was any positive duty on the flight crew to participate in or comply with orders of the MOI, the timing of the various events, the location of the applicants at the time the baby was discovered and if the flight crew knew whether it was possible for any of the applicants to have been at any time in the concourse of the terminal in which the baby was found.

169 *Third*, the applicants submit that independently of any agency contentions, the case they seek to advance against Qatar Airways is tortious involvement in the act itself, in this case the police operation undertaken by the MOI. The liability arises because Qatar Airways participated in and facilitated that operation, including by directing and assisting the applicants to disembark the aircraft and directing them to the departure lounge.

170 *Fourth*, they submit that whether there is a causative link between the alleged breaches of duty and the loss or damage suffered by the applicants is a factual question that is properly to be determined at trial. They submit that the necessary factual questions that would need to be determined include (a) had the inquiries alleged in particulars (i) to (v) been made, what answers would have been received and what steps would the captain of the aircraft have then taken, (b) had a more "tailored" announcement been made, would MOI officers still have required all five applicants to exit the aircraft, and (c) did the psychological harm suffered by the applicants encompass being directed off the aircraft independently of the male passengers, late at night in a foreign country.

171 More specifically, the applicants submit that Qatar Airways, either by itself or through its corporate subsidiary MATAR:

> … could have taken steps to ensure that, in any investigation into the identity of the mother of the newborn baby, standard procedures were followed, and that through

interaction, co-ordination or communication with the MOI, the investigation did not involve its female passengers being subjected to intimate examinations or inspections in an ambulance on the tarmac.

I.3. Consideration

172 For the purposes of a summary judgment or strike out application, it is necessary to focus on the case as pleaded to determine whether and to what extent it seeks to advance causes of action that have no reasonable prospects of success.

173 In many cases, pleadings of negligent conduct can be expressed at a relatively generic level given the scope of the duties alleged are specific and well understood, the steps taken to comply with the duties largely self-evident and the breach of those steps can readily be seen to give rise to the alleged loss and damage.

174 Applications for summary dismissal by respondents and striking out paragraphs in a statement of claim generally proceed on the basis that an applicant would succeed at a final hearing in establishing the material facts that it had alleged in its statement of claim.

175 As explained at [129] above, the exception to this approach is in circumstances where a respondent is able to adduce evidence that there are unanswerable factual propositions that are fatal to a pleaded case and any case that might be propounded by permissible amendment: *Spencer* at [22] (French CJ and Gummow J).

176 It is thus necessary to identify first, with precision, the material facts relied upon by the applicants in the proposed 2FASOC.

177 By way of summary, it is apparent that the material facts concerned with the conduct of the Qatar Airways flight were limited to the following matters:

(a) an announcement over the aircraft cabin audio system that all female passengers were required to exit the aircraft with their passports;

(b) directing and assisting the fifth applicant, who is legally blind, to exit the aircraft;

(c) directing the first, second, third and fourth applicants to a departure lounge within the Doha Airport terminal;

(d) directing the fifth applicant into a lift and down to a lobby near the tarmac;

(e) directing the fifth applicant towards the tarmac: and

(f) directing the fifth applicant back to the aircraft.

178 The fundamental issue that any pleading of negligence against Qatar Airways and MATAR must confront is that the applicants' removal from the aircraft and the subsequent examinations were part of a law enforcement operation conducted by the MOI.

179 Similarly, in many cases, allegations of agency can be pleaded at a relatively general level given the existence of well understood and established categories of agency, such as a solicitor acting on behalf of a client or a real estate agent selling a property for a vendor. Allegations of agency in more novel contexts need to be pleaded more specifically, in particular, if allegations of agency are combined with allegations of conduct by persons "akin or analogous to employees".

180 In broad terms, the negligence case advanced against Qatar Airways has three limbs.

181 *First*, and most directly, they comprise claims that the flight crew of Qatar Airways participated in and facilitated the police operation conducted by the MOI by directing the applicants to disembark the aircraft and were at least reckless as to the reason for making that direction: proposed 2FASOC at [34], particulars (i) to (vii).

182 *Second*, they comprise claims that Qatar Airways failed to take steps or adequate steps to prevent the first to fourth applicants from being directed onto the tarmac and into the ambulance and the invasive examinations of the first to fourth applicants taking place in the ambulance, and to prevent the fifth applicant from being directed onto the tarmac: proposed 2FASOC at [34], particulars (viii) to (x).

183 *Third*, they comprise an allegation that would appear is intended to constitute an allegation that "in circumstances where its corporate subsidiary", MATAR is the "contracted manager and operator of the Doha Airport", Qatar Airways breached its duty of care to the applicants: proposed 2FASOC at [34].

184 Each limb is premised on a duty of care alleged to be owed by Qatar Airways to the applicants to take all reasonable steps to avoid or minimise the risk of them suffering harm.

185 As Brennan J stated in *Sutherland Shire Council v Heyman* (1984) 157 CLR 424 at 479; [1985] HCA 41:

> Where a person, whether a public authority or not, and whether acting in exercise of a statutory power or not, does something which creates or increases the risk of injury to another, he brings himself into such a relationship with the other that he is bound to do what is reasonable to prevent the occurrence of that injury unless statute excludes that duty. An omission to do what is reasonable in such a case is negligent whether or not

> the person who makes the omission is liable for any damage caused by the antecedent act which created or increased the risk of injury.

186 For present purposes, I am satisfied that the proposed 2FASOC pleads with sufficient precision the existence of such a duty of care, except to the extent that it is alleged that the duty of care extended to the "Doha Airport tarmac", independently of any embarking or disembarking of the aircraft.

187 In my view, it is not sufficient to allege by way of a conclusionary contention that an airline owes a duty of care to avoid or minimise the risk of harm to passengers on a tarmac, except to the extent that passengers have moved across the tarmac for the purpose of embarking or disembarking an aircraft. It is a category of harm far removed from the risks of harm the subject of previous cases addressing the liability of airlines in negligence and in *Karpik* in a maritime context. The basis on which such a duty of care to avoid or minimise harm arises must necessarily be pleaded by way of material facts. No such material facts have been alleged.

188 The failure to articulate in the proposed 2FASOC any basis on which the duty of care would extend to the risk of harm independently of embarking or disembarking the aircraft means the second and third limbs of the applicants' negligence case against Qatar Airways do not have reasonable prospects of success. Moreover, with respect to the second limb, none of the steps that are alleged that Qatar Airways should have taken are identified. In the absence of any articulation of the steps how those alleged breaches could have prevented the invasive examinations and consequent injury to the applicants is not apparent. Further, with respect to the third limb, as submitted by Qatar Airways, there is simply no support or triable issue that an owner of shares in an entity by reason only of that ownership owes a duty of care with respect to the conduct of that subsidiary.

189 I am satisfied, however, that it would not have been appropriate to strike out the first limb of the applicants' negligence case against Qatar Airways had I otherwise not concluded that the exclusivity principle precluded the applicants from advancing any negligence claims against the airline. It could not be said that the first limb had no reasonable prospects of success. The claim necessarily involves factual questions that would need to be determined at trial in order to determine whether the duty of care owed by Qatar Airways to the applicants to take steps to prevent harm to the applicants has been breached and whether there is any causative link between any breach and the harm suffered by the applicants.

190 As submitted by the applicants, these factual issues would include (a) the extent of the involvement of the Qatar Airways flight crew in the disembarkation of the applicants from the aircraft, and (b) the extent to which any psychological harm suffered by the applicants may have been ameliorated had the Qatar Airways flight crew taken steps to ascertain the reason for the direction from the MOI police officers that all female passengers exit the aircraft. By way of example, the harm might have been ameliorated had the Qatar Airways flight crew, including the captain, made inquiries of the MOI police officers, and provided additional information and support to the applicants prior to and during their forced disembarkation from the aircraft.

J. NEGLIGENCE AND INTENTIONAL TORT CLAIMS AGAINST MATAR

J.1. The pleaded negligence claims

J.1.1. Duty of care

191 The duty of care alleged to be owed by MATAR is pleaded in the proposed 2FASOC at [43C]:

> As contracted manager and operator of Doha Airport, the Third Respondent owed each of the Applicants, as passengers on a flight departing from that airport, a duty of care to take all reasonable steps to avoid or minimise the risk of the Applicants suffering harm while on Doha Airport premises.

192 The duty of care is directed at the avoidance or minimisation of the risk of harm on the premises of the Doha Airport. That would self-evidently extend to the tarmac. The categories of harm from which the duties of care to avoid or minimise are alleged are not identified. Nor is there any identification of the "reasonable steps" that MATAR was required to take to comply with those duties.

J.1.2. Breach of duty

193 The applicants' breach of duty case against MATAR is pleaded in the proposed 2FASOC at [43D] in these terms:

> By reason of the conduct described at paragraphs 12 to 21 above, including the conduct of its agents and employees and of persons akin or analogous to employees or otherwise under its control or direction, the Third Respondent breached its duty of care to each of the Applicants.

194 No material facts are pleaded of the alleged agency or the basis on which the Court could conclude that unnamed persons were "akin or analogous" to employees of MATAR or otherwise under its control or direction.

195 The applicants rely on the following particulars in the proposed 2FASOC at [43D] of MATAR's alleged breach of its duty of care:

> (i) By requesting or requiring that all female passengers exit the aircraft, or by failing to take any or adequate steps to ascertain, or by being reckless as to, the reason for any request or requirement that female passengers exit the aircraft;
>
> (ii) By failing to provide the Applicants with any or any adequate explanation as to why they had to exit the aircraft;
>
> (iii) By directing the Applicants from the aircraft to a departure lounge within the Doha Airport terminal, or by failing to take any or adequate steps to prevent the same;
>
> (iv) In the alternative, by being reckless as to the reason for the requirement that the Applicants enter the departure lounge within the Doha Airport terminal, or by recklessly failing to take any steps to prevent the same;
>
> (v) By directing the Applicants into a lift and down to a lobby near the tarmac, or by failing to take any or adequate steps to prevent the same;
>
> (vi) By directing each of the First to Fourth Applicants onto the tarmac and into the ambulance;
>
> (vii) By directing each of the First to Fourth Applicants to undergo an intimate, invasive examination or inspection;
>
> (viii) In the alternative, by failing to take any or adequate steps to prevent the First to Fourth Applicants undergoing an intimate, invasive examination or inspection; and/or
>
> (ix) By directing the Fifth Applicant onto the tarmac and towards the ambulance, or by failing to take any or adequate steps to prevent the same;

J.1.3. Causation

196 The applicants' causation pleading on the negligence claims is advanced in the proposed 2FASOC at [43E] in the following terms:

> By reason of the Third Respondent's breach of duty, each of the Applicants has suffered and continues to suffer loss and damage.

197 No material facts are alleged and no particulars are provided as to how the applicants suffered loss and damage by reason of the alleged breaches of the duty of care owed by MATAR to the applicants.

J.1.4. Loss and Damage

198 As for Qatar Airways, the applicants seek general damages and exemplary damages from MATAR. The particulars provided for both categories of damages are the same as those relied on against Qatar Airways. These particulars are set out at [157]-[158] above.

J.2. The pleaded intentional tort claims

199 The applicants also seek to advance claims of assault, battery and false imprisonment against MATAR in the proposed 2FASOC at [43F] to [43M].

200 Each claim is pleaded on the basis that the "female who appeared [to the applicants] to be a nurse" was acting as an "agent or employee or a person akin or analogous to an employee … or was otherwise under [the] control or direction" of MATAR. It is alleged that the female caused each of the first to fourth applicants "to apprehend imminent physical contact with her person" or was reckless or negligent to that apprehension (at [43G]), the female intentionally came into physical contact with the first, third and fourth applicants (at [43J]) and directly subjected each of the applicants to "a total restraint on her liberty that amounted to false imprisonment" (at [43M]).

201 The claims of assault and false imprisonment are also pleaded on the basis that the "persons in dark uniforms" and "uniformed persons" were acting as "agents or employees or persons akin or analogous to employees … or were otherwise under [the] control or direction" of MATAR at [43H] and "agents or employees or persons akin or analogous to employees" of MATAR at [43M].

202 No particulars are provided of the assault and battery allegations.

203 The following particulars are provided in the proposed 2FASOC of the false imprisonment claims at [43M] (the underlined words reflect the amendments to the particulars in the proposed 2FASOC):

> (i) Each of the Applicants was confined by the armed and unarmed persons in dark uniforms, as she was directed from the aircraft to the departure lounge within the Doha Airport terminal;
>
> (ii) Each of the Applicants was confined by the armed and unarmed persons in dark uniforms within the departure lounge;
>
> (iii) Each of the <u>First, Second, Third and Fifth</u> Applicants was confined by the armed and unarmed persons in dark uniforms, as she was directed from the departure lounge into a lift and down to a lobby near the tarmac;
>
> (iiiA) <u>The Fourth Applicant was confined by the armed persons in dark uniforms, and by an unidentified employee or agent of the Third Respondent from the departure lounge into a lift and down to a lobby near the tarmac;</u>
>
> (iv) Each of the <u>First, Second, Third and Fifth</u> Applicants was confined by the armed and unarmed persons in dark uniforms, as she was directed from the lobby onto the tarmac and towards the ambulance; ~~and~~
>
> (ivA) <u>The Fourth Applicant was confined by the armed persons in dark uniforms and</u>

by an unidentified employee or agent of the Third Respondent, as she was directed from the lobby onto the tarmac and towards the ambulance; and

(v) Each of the First to Fourth Applicants was confined in the ambulance by the female who appeared to be a nurse and/or by the armed and unarmed persons in dark uniforms.

J.3. Submissions

J.3.1. MATAR's submissions

204 MATAR submits that the negligence claim and the intentional tort claims have insufficient prospects of success to warrant putting it to the time, expense and trouble of defending them and the Court should therefore set aside service, or alternatively dismiss the proceeding against it.

205 MATAR submits that for the following reasons, the first claim, that the police officers and nurse were MATAR's agents or employees or under MATAR's direction or control, has no basis in fact, and that the second claim, that MATAR owed a duty of care to the passengers that required its staff to disrupt the police operation, is bad at law.

206 *First*, to the extent that the negligence claims rely on the contention that Qatar Airways and MATAR owed a duty to prevent the MOI from undertaking its police operation, this claim has no reasonable prospects of success because (a) any duty of care owed by MATAR as an occupier is limited to a duty to take reasonable care to avoid reasonably foreseeable risks that the occupier can control, (b) the duty asserted by the applicants would impose a positive duty on Qatar Airways and MATAR to act where neither had contributed to the alleged risk of injury and it is only where a special relationship exists would the Court impose a duty to take steps to prevent harm befalling another person, (c) the imposition of a duty to take steps to prevent or persuade the armed MOI police officers from carrying out the police operation would necessarily put MATAR in breach of the law of Qatar and potentially expose them to harm, (d) it is entirely unclear what steps it, or a reasonable person in its position, could have taken to prevent the MOI from undertaking a law enforcement operation, and (e) no material facts are alleged that could provide any basis to conclude that the alleged breaches of duty caused the applicants any loss or damage.

207 *Second*, in so far as the negligence and intentional tort claims rely on the contention that MATAR, as the operator of the Doha Airport, was directing or controlling the MOI officers or the nurse in the ambulance, these claims are contradicted by unanswerable or unanswered evidence.

208 MATAR submits that it has adduced the following evidence that is fatal to the essential factual allegations that the "persons in dark uniforms" and the "female who appeared [to the applicants] to be a nurse" were employees or agents of MATAR, akin to MATAR's employees or agents, or acting under MATAR's direction or control:

(a) the persons in dark uniforms were evidently MOI police officers given (i) the differences in the uniforms of the MOI police officers and private security personnel engaged by MATAR, and (ii) Mr Coutinho's positive identification of the persons who boarded the aircraft as MOI police officers;

(b) MATAR does not employ or otherwise engage police officers or nurses; and

(c) there cannot be any doubt that the events relied upon by the applicants occurred as part of a police operation undertaken by the MOI.

209 MATAR submits that none of this evidence has been answered by the applicants, nor have they identified any evidence that they may have or may be able to obtain to contest those matters. It submits an inference that the MOI police officers and the nurse were MATAR's employees or agents, or otherwise acting under the direction or control of MATAR, cannot be drawn from the facts that MATAR was the airport operator, the MOI police officers and the nurse were on the tarmac of the Doha Airport, or even from the fact, if it were established, that the MOI needed the "permission" of MATAR to conduct its police operation.

210 MATAR submits that the allegation that it was directing or controlling the MOI police officers and the nurse can properly be described as "fanciful, trifling, implausible, improbable, tenuous or is contradicted by all the available documents or other materials".

J.3.2. The applicants' submissions

J.3.2.1 Overview

211 The applicants submit that the Court should not exercise its power to set aside service to deny them an opportunity to have their claims heard and determined at trial in the ordinary way and with the benefit of the usual interlocutory processes, citing *Agar* at [57]; *Spencer* at [24] and *Cassimatis* at [50]. They submit that this foundational proposition is strengthened in the present case because of what they characterise as the opaque relationship between MATAR, Qatar Airways and the QCAA.

212 Moreover, the applicants submit that evidence has not yet commenced and they have a pending interlocutory application dated 5 May 2023 seeking discovery from Qatar Airways of (a)

documents relating to an investigation that was ordered by the Prime Minister and the MOI into the Incident involving the applicants at the Doha Airport and all documents relating to or evidencing the preliminary findings of that investigation, (b) the findings of the specialist task force responsible for reviewing and identifying any potential gaps in the procedures and protocols followed at Doha Airport in relation to the Incident, and (c) the report into the Incident provided to the Department of Foreign Affairs and Trade by the State of Qatar.

213 The applicants submit that MATAR has not put forward "unanswerable or unanswered evidence of fact fatal to the pleaded case". In summary, they submit that the intentional tort claims raise at least three questions that need to be determined at trial, specifically (a) the precise status of the individuals involved in the incident, (b) the actions of each of them in relation to the applicants, and (c) the manner and degree of control and interaction between those individuals and MATAR.

214 The applicants submit that MATAR has not demonstrated that they only have fanciful prospects of success of establishing that (a) the persons in dark uniforms included MATAR's employees, persons akin or analogous to employees of MATAR, agents or persons otherwise under its control or direction, and (b) the nurse was an agent of MATAR or otherwise under its control or direction.

215 The applicants submit that the negligence claim against MATAR raises a "combination or mixing" of questions of fact and law, such that the Court should be particularly cautious before ordering summary judgment, as the mixed questions of fact and law are not "straightforward or confined". They also submit that the question of fact as to whether MATAR breached any duty and whether any breach caused the applicants' loss and damage cannot be described as fanciful.

J.3.2.2. Identity of persons in dark uniforms

216 The applicants submit that there is a real question of fact that needs to be determined at trial as to whether the "persons in dark uniforms" included employees of MATAR or persons akin or analogous to employees, agents, or persons under its control or direction.

217 The applicants submit that the photographs of the uniforms do not establish that the "persons in dark uniforms" were evidently and without a doubt all MOI police officers. They point to the evidence that (a) the MATAR *employed* aviation security officers' uniform is said to consist of a blue suit, white collared shirt and tie, and this is consistent with the pleading of "dark

uniforms", particularly given the incident occurred late at night in a foreign country, and (b) that the MATAR *contracted* aviation security officers' uniform is said to consist of a white shirt and dark pants, with the word "private security" on the back.

218 The applicants submit that the transcripts of their interviews with the AFP support the proposition that at least some of the persons in dark uniforms were persons employed or engaged by MATAR. Specifically, the applicants submit that (a) one of the persons who directed the third applicant has the word "security" on their back, (b) a "woman from the airport" directed the fourth applicant from the lounge into the lift and "someone from the airport" who was not armed told her to get into the ambulance, and (c) the claim in the proposed 2FASOC at [21] that the fifth applicant was directed towards the tarmac by "an unidentified male employee or agent of the Third Respondent in civilian attire" who said "no, not her" is consistent with her statement to the AFP.

219 The applicants submit that Mr Buffa's evidence that the MATAR contracted aviation security officers had the words "private security" on the back of their white shirts is consistent with the third applicant's statement in her AFP interview that at least one of the persons who directed her had the words "security" on their back.

J.3.2.3 The nurse

220 The applicants submit that there is also a real question of fact that needs to be determined at trial as to whether the nurse was an agent of MATAR or otherwise under its control or direction.

221 The applicants submit that on the evidence currently available, the Court could draw the inference that the nurse was an agent of MATAR, notwithstanding the evidence of Mr Metsovitis that MATAR did not employ or contract nurses, because (a) MATAR was the operator of the Doha Airport, (b) the examinations by the nurse took place in a restricted area of the Doha Airport, (c) MATAR is responsible for access to restricted areas of the Doha Airport, (d) there are two 24 hour medical centres in the terminal of the Doha Airport, and (e) there was "someone from the airport" and not an armed guard who told the fourth applicant to get into the ambulance.

J.3.2.4 Negligence claims

222 The applicants submit in response to what MATAR describes as the applicants' "broader case" that it is not part of their pleaded negligence case against MATAR that it "failed to prevent the MOI from carrying out a police operation". Rather, they submit, particulars (viii) and (ix) to

[43D] of the proposed 2FASOC make clear that the applicants contend that MATAR "failed to take steps to prevent the first to fourth applicants undergoing invasive examinations, and that it failed to prevent the fifth applicant from being directed towards the ambulance".

223 The applicants then advance the following submissions on duty of care, breach and causation.

224 The applicants submit that it is not "straightforward and confined" or "trite" that the law would not recognise that MATAR owed a duty of care to the applicants. They advance the following submissions as to the "legal aspect" of the existence of a duty of care.

225 *First*, the negligence claims against MATAR are not limited to an omissions case. They include allegations that MATAR directed the applicants towards and into the ambulance.

226 *Second*, the duty of care is primarily based on MATAR's status as the contracted manager and operator of the Doha Airport, not simply on the basis that it was the occupier of the premises on which the airport was located.

227 *Third*, the question of whether a risk of harm was reasonably foreseeable is a forward-looking test and conducted at a higher level of abstraction than questions of breach.

228 *Fourth*, the existence of a special relationship giving rise to a duty to act to prevent harm begs the question of whether such a relationship exists between the operator of an airport and the applicants, as found by Stewart J in *Karpik* with respect to a ship's operator and its passengers.

229 *Fifth*, the operator of an airport may owe a duty to passengers to rescue them, like an operator of a ship with respect to a passenger that has fallen overboard, citing *Karpik* at [544].

230 *Sixth*, to the extent that the Qatar Penal Code is relevant, it only extends to the exercise of "legally assigned" duties or when officers are "exercising the duties of [their] office". They submit that on no view would this extend to "the forced sexual assault of females on the tarmac" of the Doha Airport.

231 *Seventh*, whether a duty of care was owed by MATAR to the applicants must turn on an analysis of the factors bearing on the particular relationship between MATAR and the applicants. The applicants submit the following matters bear on that relationship and demonstrate that it cannot be said that they only have fanciful prospects of establishing MATAR owed them a duty of care:

(a) the risk of personal injury to passengers from security and policing operations at the Doha Airport was reasonably foreseeable;

(b) the applicants were entirely vulnerable;

(c) as the operator of the Doha Airport, MATAR had control over the screening of passengers, access to restricted areas and policies for interacting with other stakeholders in Doha Airport, including the MOI;

(d) the applicants as passengers at the Doha Airport relied and were dependent upon the protection of MATAR;

(e) there was physical, temporal and relational proximity between the applicants as passengers and MATAR as an airport operator; and

(f) during the incident in question, there was both control exercised and an assumption of responsibility by MATAR over the applicants as some of the "persons in dark uniforms" were persons employed or engaged by MATAR.

232 The applicants submit with respect to breach of duty that MATAR does not point to any law of Qatar that would impose "a duty to assist in, or not prevent, illegal acts, particularly acts that amount to sexual assault". Further, they submit that whether MATAR would have exposed their personnel to harm by taking steps to prevent the invasive examinations from occurring, is a factual question to be determined at trial.

233 With respect to causation the applicants submit that (a) the relevant test is not whether the applicants are unlikely to succeed but rather whether they only have a fanciful prospect of success, (b) any assessing of whether any breach of duty caused the applicants' loss and damage is to be determined on the basis that it was an illegal, not a legal, police operation, and (c) the issue is not whether the MOI would have continued their operation, rather would they have proceeded with their "non-consensual intimate examinations" of the first to fourth applicants. They submit that causation is a disputed factual contention that should properly be determined at trial.

J.4. Consideration

J.4.1. Duty of care

234 It can readily be accepted that MATAR as the contracted manager and operator of the Doha Airport owed each of the applicants, as passengers on a flight departing from the airport, a duty of care to take all reasonable steps to avoid or minimise the risk of the applicants suffering

harm on the premises of the airport, including the tarmac. The scope and extent of that duty is the issue that relevantly needs to be addressed.

235 The applicants seek to advance a case that the duty of care owed by MATAR to the applicants included a duty to prevent the examinations or inspections by the nurse in the ambulance from taking place.

236 In my view the duty of care owed by MATAR did not extend to taking steps to prevent the examinations or inspections of the first to fourth applicants by the nurse in the ambulance and preventing the fifth applicant from being directed towards the ambulance.

237 *First*, and most fundamentally, the alleged duty of care seeks to impose on a civilian operator of an airport a duty to take steps to prevent a government instrumentality undertaking a police operation or at least prevent a significant step in that operation from taking place. It is a duty of care that can fairly be characterised as novel. Such a claim necessarily demands a specific identification of the material facts relied upon to give rise to such a duty of care, the steps that the civilian operator was required to undertake to act consistently with that alleged duty and how any failure to undertake those steps materially contributed to any loss and damage suffered by the applicants.

238 *Second*, no material facts are pleaded in the proposed 2FASOC that would support a finding that the duty of care to "take all reasonable steps to avoid or minimise the risk of the applicants suffering harm while on Doha Airport premises" extended to taking steps to prevent the first to fourth applicants from undergoing the invasive examinations and failing to prevent the fifth applicant from being directed towards the ambulance. The contention pleaded in the proposed 2FASOC that MATAR was at all material times contracted by the QCAA to "manage and operate the Doha Airport under the supervision of the [QCAA]" is not sufficient to support such an extension of MATAR's duty of care to the applicants.

239 *Third*, the steps that it is alleged that MATAR should have taken but failed to take to prevent the examinations are not pleaded or particularised in the proposed 2FASOC. Rather, in the particulars provided of the breach of duty alleged in the proposed 2FASOC at [43D], it is asserted that MATAR failed to "take any or any adequate steps to prevent":

(a) the applicants from being directed from the aircraft to the departure lounge (particular (iii)),

(b) the applicants entering the departure lounge (particular (iv)),

(c) the applicants entering a lift and descending to a lobby near the tarmac (particular (v)),

(d) the first to fourth applicants from undergoing an invasive examination or inspection (particular (viii)), and

(e) the applicants from being directed onto the tarmac and towards the ambulance (particular (ix).

240 The applicants have identified particular *steps* in the police operation undertaken by the MOI but they have not identified what *steps* or *adequate steps* that they contend MATAR was required to take to "prevent" the MOI undertaking the invasive examinations. In many cases, the steps necessary for a person to satisfy a duty of care to act might be thought to be self-explanatory or unnecessary to spell out in a pleading. Here, however, it is not at all evident what steps MATAR could have taken to "prevent" the invasive examinations being undertaken in the course of the MOI police operation. The deficiency is most acute for causation. In particular, the basis on which any unidentified step by MATAR could have relevantly had any impact on the conduct of the MOI police operation with respect to the applicants is neither identified in the proposed 2FASOC nor readily apparent.

J.4.2. Liability for MOI police officers and the nurse

241 There is a substantial overlap in the material facts alleged to give rise to the negligence and intentional tort claims advanced against MATAR, in particular, the conduct of the MOI police officers and the nurse in the ambulance. As currently pleaded in both the FASOC and in the proposed 2FASOC, the negligence and intentional tort claims are largely, but not exclusively, dependent on allegations that MATAR is vicariously liable for the conduct of the MOI police officers and the nurse in the ambulance, or proceed on the basis that MATAR was in a position to take steps to prevent the examinations from taking place.

242 It is convenient to address first those claims insofar as they depend on the premise that MATAR failed to take steps to prevent the examinations from taking place or that the MOI police officers and the nurse were the agents of MATAR, were persons akin or analogous to employees of MATAR or were otherwise under its control or direction.

243 The material facts alleged to give rise to both the negligence and intentional tort claims against MATAR are pleaded in the proposed 2FASOC at [12] to [21]. The only conduct specifically attributed to MATAR in those paragraphs is:

(a) an "unidentified female employee or agent" of MATAR directing the fourth applicant into a lift (at [15A]);

(b) "employees or agents of [Qatar Airways] and/or [MATAR]" directing the second applicant back to the aircraft after the invasive examination (at [18(d)]);

(c) an "unidentified employee or agent" of MATAR directing the fourth applicant and her infant son into the ambulance on the tarmac (at [20]);

(d) an "unidentified staff member" of MATAR directing the fourth applicant and her infant son into the ambulance and back to the aircraft after the invasive examination of the fourth applicant (at [20]); and

(e) an "unidentified male employee or agent" of MATAR "in civilian attire" said in the presence of the fifth applicant, words to the effect of "no, not her" (at [21(b)]).

244 The particulars provided in the proposed 2FASOC at [43D] of the alleged breach by MATAR of its duty of care fall into the following categories:

(a) failing to take any or any adequate steps to determine the reason for the disembarkation request or to provide the applicants with any or any adequate explanation for the request (particulars (i), (ii), (iv));

(b) directing the applicants to disembark the aircraft into the departure lounge, onto the tarmac and into the ambulance and to undergo an "intimate, invasive examination or inspection" (particulars (i), (iii), (v), (vi), (vii) and (ix)); and

(c) failing to take any or any adequate steps to prevent the disembarkation of the applicants and the invasive examinations from taking place (particulars (iii), (iv), (v) and (viii) and (ix)).

245 None of the particulars of the alleged breach of duty expressly refer to any conduct of an employee of MATAR or security personnel contracted by MATAR. Rather, as explained at [243] above, the applicants rely on the conduct alleged in the proposed 2FASOC at [12] to [21] summarised above, on the basis that it included the conduct of MATAR's "agents and employees and of persons akin or analogous to employees or otherwise under its control or direction".

246 The applicants adopt a similar approach to the intentional tort claims pleaded against MATAR. The applicants contend the "persons in dark uniforms" and the "female who appeared to be a nurse", were acting as "agents or employees or persons akin or analogous to employees" of

MATAR and that by reason of the events alleged in the proposed 2FASOC at [12] to [21], the applicants were subjected to assault, battery (in the case of the first, third and fourth applicants) and false imprisonment.

247 The applicants do not provide any particulars of the alleged assault and battery by MATAR. The only conduct included in the particulars of false imprisonment provided in the proposed 2FASOC at [43M] specifically attributed to MATAR is:

(a) an "unidentified employee or agent" of MATAR confining the fourth applicant from the departure lounge into a lift and down to a lobby near the tarmac (particular (iiiA); and

(b) an "unidentified employee or agent" of MATAR confining the fourth applicant, as she was directed from the lobby onto the tarmac and towards the ambulance (particular (ivA).

248 In my view, for the following reasons, the negligence and intentional tort claims against MATAR have no reasonable prospects of success insofar as they seek to attribute liability to MATAR for the conduct of the MOI police officers and the nurse in the ambulance, or contend that MATAR owed a duty of care, or was otherwise in a position to prevent the invasive examinations taking place in the ambulance. I am also satisfied that there is no evidence available or likely to be available to refute MATAR's evidence that "the armed and unarmed persons in dark uniforms" and the "female who appeared [to the applicants] to be a nurse" were *not* agents of MATAR, akin to MATAR's employees or agents, or acting under MATAR's direction or control.

249 *First*, the fundamental difficulty with the negligence and intentional tort claims to the extent they plead bases for vicarious liability beyond persons who were employees of MATAR is that no material facts are pleaded or particulars are provided from which any coherent claim is advanced in the proposed 2FASOC, beyond a mere assertion that the "persons in dark uniforms" and the "female who appeared [to the applicants] to be a nurse", were agents of MATAR, akin to MATAR's employees or agents, or acting under MATAR's direction or control. No attempt is made to identify the agents beyond these general assertions. MATAR should not be left to speculate whether the agency case referrable to the "persons in dark uniforms" is limited to persons contracted by MATAR to provide airport security services, or that it be alleged to extend to employees of the QCAA and the MOI.

250 *Second*, the search for the mother of the abandoned baby was quintessentially a police matter. It had no apparent connection to the screening of passengers in a terminal in the course of embarking or disembarking an aircraft. Requiring female passengers to disembark an aircraft for the purpose of conducting invasive examinations on female passengers in an ambulance on the tarmac was by its very nature an exceptional and extraordinary activity. The invasive examinations were conducted as part of the police operation undertaken by the MOI. It is inherently unlikely that any person who participated in that operation, other than a person contracted by MATAR or an employee of MATAR, was relevantly an agent of MATAR or acting under MATAR's direction or control. This applies with particular force to the nurse in the ambulance.

251 *Third*, MATAR has adduced unanswered or unanswerable evidence that the persons directing the MOI operation were police officers of the MOI and the nurse was not employed by or under the direction or control of MATAR. I am satisfied that the evidence relied upon by MATAR establishes the following factual propositions, none of which was relevantly answered by the applicants:

(a) on the evening of 2 October 2020, the MOI conducted a criminal investigation for the purpose of seeking to locate the mother of a newly born baby that had been found in a rubbish bin, in a toilet cubicle of the terminal at the Doha Airport;

(b) as part of its investigation the MOI requested airlines, including Qatar Airways, to disembark all female passengers;

(c) the MOI is responsible for policing functions at the DOHA Airport, including the protection of the public and the prevention, detection and incident response to crimes committed at the Doha Airport;

(d) police officers from the MOI are deployed at Doha Airport for the purpose of providing an armed response to major incidents and they wear dark navy shirts and pants, black boots and some carry firearms;

(e) MATAR's functions, relevantly included, the screening of transferring passengers and baggage, the handling of unattended baggage and the patrolling of public and restricted areas of the Doha Airport but it is not responsible for policing;

(f) security personnel employed by MATAR wear a blue suit, collared white shirt and tie, and security personnel contracted by MATAR as aviation security officers wear white business shirts and business pants;

(g) neither security personnel employed by MATAR nor security personnel contracted by MATAR carry firearms; and

(h) MATAR does not employ or contract any nurses or paramedics at the Doha Airport.

252 Moreover, the applicants did not point to any evidence or plausible basis upon which any of these propositions could be answered.

253 In my view, from a practical perspective, the applicants do not have more than a "fanciful" prospect of successfully displacing any of the following factual propositions that are established by the evidence summarised at [251] above:

(a) the direction to disembark the applicants originated from the MOI;

(b) the invasive examinations of the first to fourth applicants were conducted by the nurse at the direction of the MOI;

(c) the direction to disembark the applicants and the examinations of the first to fourth applicants were undertaken pursuant to a criminal investigation conducted by the MOI; and

(d) the "armed persons in dark uniforms" referred to in the proposed 2FASOC were police officers from the MOI.

254 *Fourth*, it is significant that the applicants' response to a request for particulars of the facts, matters or things relied upon to allege that the "armed and unarmed persons in dark uniforms" were employees, agents or were "akin or analogous to" employees of MATAR contained the following statement:

> The requested particulars are facts, matters and circumstances which are uniquely in your clients' knowledge.

255 It cannot simply be asserted that the basis on which the applicants seek to advance a case that "the armed and unarmed persons in dark uniforms" are agents or akin to employees of MATAR as a matter "uniquely" in MATAR's knowledge. No attempt is made to identify which particulars of the alleged breach were attributable to (a) employees of MATAR, (b) persons contracted by MATAR to provide security services or other alleged agents of MATAR, or (c) persons akin or analogous to employees of MATAR. The pleading has all the hallmarks of the planting of a forest of contingencies that obscures rather than illuminates the case that the applicants seek to advance and MATAR must meet.

256 *Fifth*, it is also significant, particularly for the intentional tort claims, that no allegation is made in the proposed 2FASOC that MATAR was aware that the examinations were taking place in the ambulance before they were conducted. Nor is it alleged that the police operation undertaken by the MOI was a joint security operation undertaken by MATAR and the MOI, or that MATAR authorised or otherwise consented to the actions of the MOI police officers or the ambulance entering the tarmac and the nurse conducting the examinations.

257 Nor was there any evidence adduced at the hearing of MATAR's application that it was aware that examinations were being conducted by nurses in ambulances on the tarmac at the direction of MOI police officers. Mr Buffa's evidence in cross examination was that he was aware (a) a baby had been found in the terminal of the Doha Airport, (b) the MOI was undertaking an investigation, and (c) that there was at least one ambulance on the tarmac, but he was not aware of their purpose for being there.

J.4.3. Balance of claims advanced against MATAR

258 The negligence claims of the applicants are not limited, however, to a claim that MATAR owed a duty of care to them to prevent the first to fourth applicants from undergoing the invasive examinations in an ambulance on the tarmac and that it failed to prevent the fifth applicant from being directed towards the ambulance.

259 Nor, are the assault and false imprisonment cases against MATAR limited to cases dependent on establishing that MATAR was vicariously liable for the conduct of the MOI police officers or the nurse in the ambulance.

260 Rather, it is evident from the matters alleged in the proposed 2FASOC that the cases advanced by the applicants include:

(a) a negligence case against MATAR pleaded in effect, if not form, as a participation and facilitation of tortious conduct case (particulars (iii), (v) to (vii) and (ix) of the allegation of breach of duty at [43D] of the proposed 2FASOC); and

(b) vicarious liability for assault and false imprisonment for conduct of employees of MATAR in giving directions to the applicants in connection with the steps leading up to and following the invasive examinations in the ambulance (particulars (iiiA) and (ivA), and more generally the other particulars of the false imprisonment claim at [43M] of the proposed 2FASOC).

261 I am not satisfied that MATAR has demonstrated that the claims advanced by the applicants, at least to the extent that they referred to the employees of MATAR or could be repleaded to refer specifically to the conduct of contracted security personnel of MATAR, can be described as "fanciful, implausible, improbable, tenuous or contradicted by all available documents or other materials". It was common ground that at all material times MATAR was engaged by the QCAA to manage and operate the Doha Airport. The proposition that its employees gave directions to the applicants in the manner alleged in the proposed 2FASOC is not inherently implausible.

262 In my view, at least (a) the extent of the involvement of MATAR's employees or contracted security personnel in the incident, (b) the specific content and context of any specific directions given by them to the applicants, and (c) the extent to which MATAR employees or contracted security personnel were subject to the control of MOI police officers or otherwise under any obligation to act in accordance with their directions, are factual disputes that make a trial necessary.

263 These cases necessarily raise factual questions that would need to be determined at trial that are not precluded by the "unanswered and unanswerable" factual propositions identified at [251] above. The "unanswered and unanswerable" factual propositions relevantly only extend to the identities of the "armed persons in dark uniforms" and the nurse in the ambulance.

264 The factual questions that would need to be determined at trial, include the identity of and specific directions given by (a) the "unarmed persons in dark uniforms" alleged in the proposed 2FASOC at [15], [17], [19], (b) the "unarmed men in dark uniforms" at [21], (c) the "man in a dark uniform" alleged in the proposed 2FASOC at [18], (d) the unidentified female employee or agent of MATAR alleged in the proposed 2FASOC at [15A], (e) the unidentified employees or agents of MATAR alleged in the proposed 2FASOC at [18(d)] and [20], (f) the unidentified staff member of MATAR alleged in the proposed 2FASOC at [20(e)], and (g) the unidentified male employee or agent of MATAR alleged in the proposed 2FASOC at [21(b)].

265 More generally, these factual questions would include (a) the degree and nature of any control that MATAR might have had over the movement of the applicants through the terminal and onto the tarmac, (b) the specific content of any instructions given by the MOI police officers to any employees or contracted security personnel of MATAR, (c) the extent to which MATAR employees and contracted security personnel may have assisted the MOI police officers, and

(d) any knowledge MATAR employees or contracted security personnel might have had as to the invasive examinations being conducted in the ambulance by the nurse.

266 These factual questions are not readily capable of determination on a summary basis. Answers to these questions are necessary to determine (a) the specific content of any legal duty owed by MATAR as an airport operator to take reasonable care to avoid harm or injury to the applicants as passengers for reward passing through the terminal of the Doha Airport, (b) whether MATAR did something that increased the risk of injury or harm to the applicants in connection with the MOI police operation, (c) whether MATAR failed to do something that might have reduced that risk, and (d) whether in all the circumstances MATAR has breached any duty to take reasonable care to avoid harm or injury to the applicants.

267 These factual issues would need to be resolved before the precise scope and extent of MATAR's duty of care could be determined and the extent to which MATAR may have breached that duty of care by participating in or otherwise facilitating the police operation conducted by the MOI that culminated for present purposes in the invasive examinations in the ambulance on the tarmac of the Doha Airport.

K. APPLICATION FOR LEAVE TO AMEND

268 Finally, it is necessary to address the Amendment Application, seeking leave to amend the FASOC, in the form of the proposed 2FASOC.

269 The applicants submit that the proposed amendments sought to be advanced in the proposed 2FASOC are not obviously futile and are necessary to ensure that the real questions in controversy between the parties are decided. They submit there is no relevant prejudice to the respondents because the proceedings are still at an early stage, no defences have been filed, no orders for discovery have been made and the proceeding has not yet been set down for trial.

270 Given my finding that the exclusivity principle in the Montreal Convention is engaged, it would be futile to grant the applicants leave to amend the FASOC in the form of the proposed 2FASOC in relation to the claims they seek to advance against Qatar Airways.

271 As currently pleaded in the FASOC and sought to be pleaded in the proposed 2FASOC, each of the negligence and intentional tort claims against MATAR is advanced on alternative bases. Each claim seeks to attribute liability to MATAR for persons "who were acting as agents or employees or persons akin or analogous to employees of [MATAR] or were otherwise under its control or direction". The applicants do not advance any attribution of liability against

MATAR for the negligence or intentional tort claims limited to employees of MATAR and the agency claims are not limited to persons contracted by MATAR to provide airport security services.

272 Moreover, the battery claims alleged against MATAR are exclusively dependent on the premise that the nurse was an employee of MATAR, an agent of MATAR, a person akin or analogous to an employee of MATAR or a person otherwise under its control or direction. Given my conclusions above with respect to any attribution of liability to MATAR of the conduct of the nurse, that claim has no reasonable prospects of success.

273 It follows that the negligence or intentional tort claims, as currently framed, cannot proceed to trial. The claims are not pleaded in the FASOC or in the proposed 2FASOC in a manner that allows for the exclusion of the impermissible claims with respect to MOI police officers and the nurse. As *currently pleaded* and *proposed to be pleaded*, the negligence claims have insufficient prospects of success to warrant MATAR from being put to the time, expense and trouble of defending them.

274 In the circumstances, in my view, the appropriate course is to grant leave to the applicants to file a revised 2FASOC limited to claims against MATAR that can be advanced independently of (a) any alleged vicarious liability for persons, other than employees of MATAR or persons contracted by MATAR to provide security services at the Doha Airport, and (b) any allegation that MATAR owed a duty of care to the applicants to take steps to prevent the nurse conducting the invasive examinations of the first to fourth applicants in the ambulance as part of the police investigation undertaken by the MOI.

275 I am satisfied that granting leave to the applicants to file an amended pleading in that form would not be so obviously futile that it would be liable to be struck out. It would raise complex questions of fact and law that could not properly be resolved by way of summary judgment.

276 In addition, not determining these negligence claims on a summary basis would permit the applicants to have their claims against MATAR to be heard and determined in the ordinary way after taking advantage of the usual interlocutory processes.

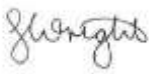
277 I have therefore concluded that it would be premature to accede to MATAR's application that service of the originating application should be set aside. However, the claims in the FASOC, the current pleading, suffer from the same issues as the claims against MATAR in the proposed 2FASOC. It will therefore be necessary for the applicants to file a revised 2FASOC and a

second further amended originating application that are consistent with these reasons. If the applicants do not file a revised 2FASOC and second further amended originating application consistent with these reasons within a relatively short time period it would likely follow that service of the originating application on MATAR should be set aside.

L. DISPOSITION

278 The Amendment Application seeking leave to amend the FASOC in the form annexed to the Amendment Application is to be dismissed, judgment is to be given in favour of Qatar Airways, leave is to be given to the applicants to file a second further amended originating application and a second further amended statement of claim that are consistent with these reasons for judgment (**Amended Pleadings**) by no later than 3 May 2024, and the application by MATAR to set aside service of the originating application is to be stood over pending consideration of any Amended Pleadings.

I certify that the preceding two hundred and seventy-eight (278) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley.

Associate: 

Dated: 10 April 2024

SCHEDULE OF PARTIES

NSD 837 of 2022

Applicants

Fourth Applicant:	DHL22
Fifth Applicant:	DHM22