

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. 140 of 2018

BETWEEN:

Parkes Shire Council (ABN 96 299 629 630)

Appellant

and

South West Helicopters (ABN 64 085 167 951)

Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

10 I certify that this Outline of Oral Argument is in a form suitable for publication on the internet.

Part II:

1. Claims by non-passengers against aviation carriers for nervous shock, consequent upon the death of a passenger, fall outside of the scope of operation of Part IV of *Civil Liability (Carriers' Liability) Act 1959* (Cth) ("CACL Act"). Appellant's Submissions (AS) [8]-[10].

CONVENTIONS - CARRIER LIABILITY TO PASSENGERS/CONSIGNORS ↔ LIABILITY TO THIRD PARTIES

2. **Separate treatment of liability to consignors/passengers, and to third parties:** The *Warsaw Convention* of 1929 emerged from conferences held from 1925 on private air law.

20 **Supplementary Book of Authorities ("SBA") – Tab 23 pp375-6.** From 1926 the areas to be regulated were divided into different streams within the committee of experts, CITEJA, within which:

a. "Liability of the carrier towards consignors of goods and toward passengers" was allocated to the Second Commission.

b. "Damage and liability toward third parties (landing, collision and jettison) was allocated to the Third Commission. **SBA 376.**

3. In May 1929 the Third Commission produced a draft recommending, controversially, unlimited liability to third parties on the ground, which was referred back for further study: **SBA p378.** By contrast, the *Warsaw Convention* was finalised and signed by 13 nations at a conference in October 1929, which also resolved to continue work on "other questions which it would be desirable to regulate by international convention": **SBA p379-80.**

30 4. **Liability to third parties:** The history at **SBA 380-2** emphasises the distinction between carrier liability regarding passengers and freight, and liability regarding third parties. The 1930 draft, referred to at 382.1, is set out at **SBA 389.** The eventual agreement, the *Rome Convention 1933*, did not command wide acceptance: **SBA tab 24 397-399;** 396 summarises the earlier history.

5. New South Wales was the first Australian jurisdiction to legislate for third party damage, in the *Damage by Aircraft Act 1952*: **SBA tab 3 p33**; 2nd Reading Speech at SBA 344 refers to the *Rome Convention 1933* and to legislation elsewhere including Britain. The later *Rome Convention 1952* was ratified and implemented by Australia: **SBA tab 1 p4, 8,9,16**: actions in trespass and nuisance were removed, but no-fault liability created, but only applicable to flights with an international dimension. This was the legislative context of the 1959 CACL Act and the 1967 CACL Act in NSW.

6. Australia later denounced the *Rome Convention 1952*, and passed the *Damage by Aircraft Act 1999*: **SBA tab 2 ss 2, 3 9, 10, 13**; tab 20 2nd Reading Speech **337-8**. That Act applied at the
10 time of these events. Section 10(1)(d) has been considered but its full scope left open: **SBA tab 9 ACQ Pty Ltd v Cook [2009] HCA 28; 237 CLR 656; SBA tab 9 100 [14], 103 [34]**. See Leeming JA at **Core Appeal Book (CAB) 394-5 [343]-[345]**. Basten JA referred to the 'separate statutory scheme' for third party liability at [138] but did not analyse it.

CARRIER LIABILITY TO PASSENGERS/CONSIGNORS

7. **Centrality of the contract:** The critical context of s35 of the CACL Act, and in particular the words "in respect of", is the scope of the *Warsaw Convention* and its successors ("Carrier Conventions") as implemented domestically as well as the third party liability legislation referred to above. The contract of carriage is central to the operation of the Carrier Conventions with respect to passengers: AS [11]-[12]; **JBA tab 3 pp56, 57, 71, 114-6**.

20 8. The contract brought into existence pursuant to Art 3, where a passenger ticket has been delivered, operates to trigger the key elements of the Convention: AS [53]-[56]; *Block* at JBA 1 tab 11 321-2, 324-5; *Gulf* at SBA tab 11 154; **Herd JBA 1 tab 15 at 452E**.

NERVOUS SHOCK CLAIMS

9. The non-passenger is necessarily a stranger to the contractual relationship. Part IV should not be seen as regulating the relationship between non-passenger and carrier. Tortious liability for nervous shock was established in the UK at least by the 1920's: *Jaensch v Coffey* **JBA 2 tab19 at 567**. The reasoning of the majority in *South Pacific Air Motive v Magnus* is correct: **JBA 2 tab 25 Hill J at 737C-G ; Sackville J at 760G, 762B-D, 764F-G; 765C-F**. The third party is dealt with by the
30 regulatory regime stemming from the Third Party Conventions. The Carrier Conventions are not apt to capture regulation of third parties. AS [57]-[61]; Reply Submissions ("Reply") [20].

10. The exception to this is a derivative action brought through or under a passenger. The purpose of Art 24(2) of the Convention was to allow signatory nations to individually provide for the

person(s) to whom a passenger's action will devolve upon their death. **AS [43]-[44], Reply [16]-[19]; Sercel JBA 3 tab 31 1149 at [46]-[49]; [113]; In Re Mexico City Aircrash JBA 2 tab 18 at 523-4; Lockerbie at JBA 1 tab 6 at 482-3.**

11. The principle of exclusivity implemented by the Passenger Conventions and CACL Act did not seek to regulate all liability of carriers. A nervous shock claim is beyond the substantive scope of the Carrier Conventions and Part IV. AS [29]-[32], [36]-[39], [40]-[46]; *Block* at JBA 1 tab 11 321, 330-331, 334, 338; *Herd* 1 tab 15 at 460-461; *Sercel* at 1150.

ERROR BELOW

10 12. Basten JA's focus on 'the timing and the event and not the nature of the cause of action' (at [101]), drawing on cases brought by passengers, diverts attention from the key question: are tortious claims brought by third parties, not sourced in the rights the passenger would have had if he or she had survived, governed by the Carrier Conventions at all? The answer should be "no": AS [22]-[23], [24]-[27].

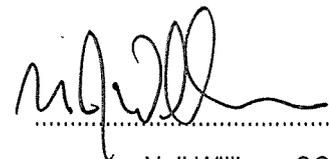
RESPONDENT'S SUBMISSIONS

13. *Zicherman* "involved auxiliary issues: who may seek recovery in lieu of passengers, and for what harms they may be compensated": *Tseng JBA 1 tab 13 p387; Zicherman* JBA tab 32 p 1172.2, 1174.3, 1178.8. But "the Convention's preemptive effect on local law extends no further than the Convention's own substantive scope"... "A carrier therefore is indisputably liable under local law for injuries occurring outside of that scope: eg for passenger injuries occurring before 'any of the operations of embarking' or disembarking": *Tseng JBA 1 tab 13 at 389. Zicherman* concerned loss of society damages: **1168**. It says nothing as to the liability of an operator in tort to third parties for nervous shock. *Tseng* supports the appellant. Reply [3]-[10].

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14. The proper approach is that of Leeming JA at [351] CBA 398.

Dated: 14 November 2018


Neil Williams SC