IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. 140 of 2018

BETWEEN: Parkes Shire Council (ABN 96 299 629 630)

Appellant

and

10 South West Helicopters Pty Ltd (ABN 64 085 167 951)

Respondent

APPELLANT'S SUBMISSIONS

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. The issue raised by this appeal is whether a tortious claim for psychiatric injury to a non-passenger following the death of a passenger during carriage to which Part IV of
20 the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) applies, is regulated by the provisions of that Part.

Part III:

3. I certify that the appellant has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903* (Cth). No notice has been given.

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Filed on behalf of the Appellant

5 July 2018

Part IV:

4. The reasoning of the primary judge is contained within *Stephenson v Parkes Shire Council* (2014) 291 FLR 319. The reasoning of the NSW Court of Appeal is contained within *South West Helicopters Pty Ltd v Stephenson* (2017) 327 FLR 110.

Part V:

5. The Appellant is a regional local Council. As part of its operations in 2006 it engaged the Respondent to conduct a low-level aerial noxious weed survey by helicopter. Two of the Appellant's weed officers, Mr Malcolm Buerckner and Mr Ian Stephenson, were on the flight. The pilot, an employee of the Respondent, was Mr Thrupp. The survey flight took place on 2 February 2006. During the course of the flight the helicopter struck powerlines and crashed, killing the occupants.

6. Mr Stephenson's wife, daughter and son each brought claims for nervous shock against both the Appellant and the Respondent. Cross claims were filed between the Appellant and Respondent respectively. It is (now) common ground that the flight fell under the regulatory regime set out in Part IV of the *Civil Aviation (Carrier's Liability) Act 1959* (Cth), in this instance given operation by virtue of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW).

7. At first instance, Bellew J found that the claims for nervous shock against the Respondent should be determined at common law, and accordingly allowed them. The majority of the NSW Court of Appeal (Basten and Payne JJA, Leeming JA dissenting) found error in Bellew J's approach. They determined that the nervous shock claims against the Respondent fell within the scope of the operation of s35 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth). By virtue of the fact that the claims by the family members had been brought more than two years post the date of accident, any cause of action under s35 against the respondent was extinguished by the operation of s34.

Part VI:

8. The majority of the Court of Appeal erred in determining that the claims for nervous shock brought by the members of the Stephenson family fell within the operation of s35 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the CACL Act"). The Court of Appeal ought to have determined that claims by non-passengers for nervous shock, consequent upon the death of a passenger, fall outside of the scope of operation of Part IV. Such claims should be determined at common law.

9. In construing s35 of the CACL Act, the majority:

    a. Placed too much weight upon consideration of the timing and nature of an event giving rise to an injury of death, over the form of the cause of action brought.

    b. Placed insufficient weight upon the fundamentally contractual nature of the relationship between passengers and carriers.

    c. Did not properly recognise the distinction between claims brought by non-passengers which:

        i. are wholly derivative of a liability in the carrier to a passenger, and

        ii. those claims which are in fact a form of primary liability in the carrier to the passenger directly.

    d. Applied international cases relating to actions between passengers and carriers as if they were directly applicable to non-passengers.

10. The correct approach to interpretation of s35 was that adopted by Leeming JA in his dissenting reasons. Leeming JA concluded that the nervous shock actions brought by the members of the Stephenson family fell outside of the operation of s35. This approach should be preferred for a number of reasons:

a. This approach properly recognises that liability for psychological injury to a non-passenger is not a derivative form of liability, but a primary form of liability.

b. It properly recognises that whether the CACL Act (or its international counterparts) has application in a given circumstance turns upon the contractual relationship between passenger and carrier.

c. The interpretation is consistent with the proper recognition of other forms of liability in carriers to non-passengers which clearly fall outside of the operation of the CACL Act.

10 d. The interpretation results in a harmonious construction of s35 of the CACL Act with s36 of the same legislation (which relates to liability in the event of injury to a passenger), and removes any tension between the operation of s35 and the operation of s37 of the CACL Act.

Approach to interpretation

11. Ascertaining the appropriate operation of s35 hinges upon the interpretation of the phrase "in respect of", as found within that section.

12. Stripped of context, the phrase "in respect of" is merely a relational term, the meaning of which has the potential to be very broad or very narrow. As was recognised below by Leeming JA at [274] – [280], it is essential to the task of
20 construing the operation of the words "in respect of" in s35 to have regard to the section's context and purpose.

The CACL Act and the International Scheme

13. Section 35 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the CACL Act") falls within Part IV. It is uncontroversial that Part IV represents the domestic implementation of an international scheme for the regulation of the liability of air carriers, both in relation to passengers and in relation to cargo.

14. The international scheme is embodied by the *Warsaw Convention*, as subsequently amended at the Hague, and now the *Montreal No 4 Convention* (collectively "the Conventions"). There has been an extended history of development and amendment of the Conventions. A succinct history of the relevant developments is set out by Leeming JA [296] - [300]. The Conventions endeavour to create a uniform international approach by signatory nations to the regulation of liability of carriers in certain circumstances.

15. The CACL Act endeavours to extend the operation of this international scheme for regulation of liability to inter-state flights within Australia. The terms of Part IV mirror, to a substantial degree, the provisions of the Conventions.

16. By virtue of the constitutional limitations on Commonwealth legislative power, the CACL Act cannot regulate wholly intra-state flights, such as that presently under consideration. However, the *Civil Aviation (Carrier's Liability) Act 1967* (NSW) contains ambulatory provisions which give the provisions of Part IV operation as a state law with respect to intra-state flights.

17. In the above context, it is uncontroversial that, insofar as possible, the provisions of Part IV should be construed in such a manner as to operate harmoniously with their international counterparts.

Section 35 and the "Exclusive Code"

18. In circumstances in which Part IV of the CACL Act applies, s35 regulates liability as between passenger and carrier in the event of the passenger's death during the course of the flight (or embarking or disembarking). Section 35 of the CACL Act finds its counterpart in Article 17 of the Convention, albeit the wording of the provisions is different.

19. The Conventions are said to give rise an "exclusive code" for liability in circumstances in which their operation is engaged. That is to say, that in circumstances in which the Conventions provide for liability (or in some cases an absence of liability) they govern the field to the exclusion of any cause of action

under some other law. In this regard, the Conventions are said to have a pre-emptive effect upon the operation of liability under other laws for a given event falling within the scope of their operation.

20. This pre-emptive effect of the Conventions is taken up by the CACL Act and, for the purposes of the present case, encapsulated by s35(2). The result is that, if s35 applies to the claims brought by the Stephenson Family, it affords the only relief to which they are potentially entitled.

21. This raises the question of the scope of the operation of the exclusive code, and whether it extends to the circumstances of the plaintiffs' claims.

10 ***The use of the International Cases***

22. Basten JA commences his approach at [86] – [90] with an analysis of international cases discussing the "exclusivity principle" and its operation. From that analysis, he reaches the conclusion set out in [90] that "the preemptive scope of the Convention depends not on the qualitative nature of the act or omission giving rise to the claim but on when and where the salient event took place".

23. This statement underpins the approach which Basten JA subsequently adopts in the interpretation of s35. In adopting this position, Basten JA arrives at a consideration of s35 which disregards the nature of a claim, or whom the claimants may be, but focuses exclusively on the timing and place of the event causing injury or death. That
20 this notion underpins Basten JA's reasoning is apparent from the repetition of the proposition throughout his Judgment[1].

24. Basten JA's conclusion that the timing and place of the event is the paramount consideration is, however, founded upon cases which do not relate to non-passengers, but instead to the relationship between passengers and carriers. Those cases do not shed light on the present question and ought to have been distinguished for that reason.

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[1] See, in particular, paras [101], [121] and [149] – [150]

25. The foregoing was recognised by Leeming JA at [332] – [339]. The conclusion reached by Leeming JA is borne out by a consideration of the cases to which reference is made. In particular:

a. The decision in *El Al Israel Airlines Ltd v Tsui Yuan Tseng* 525 US 155 (1999) involved a claim between passenger and carrier. Specifically, Ms Tseng sued El Al for damages following an intrusive security search. Whilst the case did indicate that, in circumstances as between passenger and carrier, the scope of Conventions' operation is premised upon the timing and place of injury, the case was wholly focussed upon the passenger/carrier relationship. Nevertheless it was acknowledged by Ginsburg J at p 172 that the "Convention's preemptive effect on local law extends no further than the Convention's own substantive scope".

b. The decision in *Stott v Thomas Cook Tour Operators Ltd* [2014] AC 1347 related to an action by a passenger based under anti-discrimination legislation. The Court held, referencing the American decision in *King v American Airlines Inc* (2002) 284 F 3d 352, that the questions in determining whether the claim was preempted by the *Montreal No 4 Convention* was when and where the relevant incident occurred. However, the critical issue in that case again related purely to a passenger. The approach adopted by the Court also reflected the passenger's argument that the Convention was circumvented because some of the relevant discriminatory conduct occurred prior to embarkation. Nevertheless, the Court recognised a potential distinction between the "temporal" scope of the Convention and its "substantive" scope, but decided that both scopes were effectively co-terminous in that case.

c. The decision in *King* similarly focussed on injury allegedly caused to two african-american passengers by virtue of racial discrimination by the carrier. The claims were found to be preempted by the Warsaw Convention. The decision was again, however, heavily centred on the relationship between

passenger and carrier. It was this, and the desire to maintain the uniformity of liability which underpins the operation of the Convention, which drew the Court's particular attention.

26. In the seminal passage of *King* quoted in *Stott*, and by Basten JA[2], much reliance is placed upon the qualitative equivalence of an action brought by a passenger who falls on an escalator in a terminal, and one who falls on an escalator whilst embarking. Axiomatically, however, this qualitative equivalence is not applicable in circumstances when one considers a nervous shock action by a non-passenger. The incantation of the focus upon the temporal aspects of injury is of little assistance in ascertaining the intended scope of the Conventions (or the CACL Act).

27. That the temporal and substantive scope of the "exclusive code" may be coterminous in circumstances when one considers passenger and carrier is wholly unsurprising, given the drafting of Articles 17 and 24 of the Warsaw Convention and their coverage of all liability as between those parties. However, the substantive scope of the Convention cannot, in all circumstances, simply be referable to its temporal scope, especially once the claimant is further removed from the passenger. In failing to appropriately recognise this, and distinguish the international cases relating to passengers from the present circumstances, the majority fell into error.

28. That there must be consideration of matters more than simply the temporal scope is reinforced by the material:

    a. which emphasises that the Conventions, and its domestic counterpart in Part IV of the CACL Act, is designed to only regulate certain rules affecting the liability of carriers, not all liability, and

    b. which shows there remain a vast number of ways in which carriers are exposed to unlimited liability to third parties, thus limiting the policy of the

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[2] At [89]

certainty and uniformity of liability which underlies the jurisprudence on the preemptive effect of the exclusive code.

A principle of limited exclusivity

29. As noted by Leeming JA at [316], [321] - [322], the principle of exclusivity implemented by the Conventions and the CACL Act is limited in it scope and effect. That is, the design of the Conventions and the CACL Act was not to universally regulate all liability of carriers, rather to codify only "certain" rules relating to that liability.

30. That the principle of the exclusivity of liability is accordingly limited was also recognised by Handley JA in *United Airlines Inc v Sercel Australia Pty Ltd* (2012) 289 ALR 682 in a number of international cases, including those which propound the importance of the principle:

    a. In *Sidhu*[3], the case representing arguably the "high water mark" of the application of the "exclusivity principle", Lord Hope of Craighead observed, with respect correctly, that the Warsaw Convention was designed only to regulate certain liabilities of carriers, not all of their potential liabilities. He thus described the code as a "partial harmonisation, directed to the particular issues with which it deals".

    b. In the earlier decision in *Grein -v- Imperial Airways Limited* [1937] 1 KB 50 Lord Justice Green stated the following at p 74:

> *"In approaching the construction of such a document as this Convention it is, I think, important at the outset to have in mind the general objects so far they appear from the language used and the subject matter with which it deals. The object of the Convention is stated to be*

[3] *Sidhu v British Airways Plc* [1997] AC 430

'The unification of certain rules relating to international carriage by air.'

By '... unification of certain rules ...' is clearly meant 'the adoption of certain uniform rules' that is to say rules which will be applied by the courts of the High Contracting Parties in all matters where contracts of international carriage by air come into question.

31. In *Thibodeau v Air Canada* [2014] 3 SCR 340, it was again recognised that the exclusivity principle is one of limited scope at 342-343, where it was stated that the *Montreal No 4 Convention* does not deal with all aspects of international carriage by air, but is exclusive with respect to those matters with which it does deal. At 344 in the same case a distinction was drawn between the "substantive scope" of the operation of the *Montreal No 4 Convention* and its "temporal scope".

32. This is a proper distinction. The cases emphasising timing and placement of injury clearly relate to the passenger/carrier relationship and are examining the circumstances, temporally, in which the preemptive effect of the code should be implemented. However, this criterion should not be applied as the determinant of the substantive scope of the Conventions as an antecedent question.

33. As could be anticipated given the foregoing, there are forms of liability arising in carriers which are not governed by the Conventions (or the CACL Act) nor subject to its preemptive effect. As noted by Hill J in *Magnus*[4] at 321E - G and by Leeming JA at [321] - [329] and at [344] - [346], examples of these include:

    a. Liability to those whose property (other than cargo) is damaged by an aircraft.

    b. Liability to those who are physically injured on the ground during the course of the crash.

    c. Liability to the passengers of another aircraft.

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[4] *South Pacific Air Motive Pty Ltd v Magnus* (1998) 157 ALR 443

d. Liability to a non-passenger who witnesses an accident, but has no connection with a passenger on board.

34. As observed by Hill J in *Magnus* at 321D-F, there is nothing within the Conventions that suggests an intention to regulate the liability of carriers in those circumstances. In each of the above instances the liability of the carrier falls outside of the scope of the operation of the "exclusive code", and thus the operation of other domestic law is not preempted. The prospective liability of the carrier to the injured party is in no way derivative or connected with the relationship between the carrier and a passenger (or cargo). Rather, it is a primary form of liability arising independently by virtue of the relationship directly between the carrier and the party suffering the loss.

35. Once the existence of these forms of liability to a non-passenger is acknowledged, it must be accepted that the extension beyond passengers of the scope of the preemptive effect of the Conventions no longer achieves the underlying policy aim of uniformity and certainty of liability in the carrier.

36. What flows from the various forms of liability in carriers to non-passengers which clearly fall outside of the operation of the "exclusivity principle" is that:

a. the certainty and uniformity provided by that principle is limited in its scope, and applies only to certain relationships with carriers, and

b. the determination of what liability is caught by the pre-emptive effect of the code cannot merely be determined by the timing and place of the injury or death. Some attention must also be directed toward the identity of person bringing the cause of action and the nature of the cause of action pressed against the carrier.

37. This is a difficulty which is not recognised in the reasoning of Basten JA, nor by Beaumont J in *Magnus* at 318C - G. Both assume the direct application of the policy underlying the enforcement of the exclusive code to circumstances involving non-passengers, without due contemplation of the fact that the certainty of liability afforded by the "exclusivity principle" in relation to passengers simply cannot be

achieved with non-passengers given the manifold ways in which liability to non-passengers can arise which will not be governed by the Convention.

38. In the circumstances, the approach of Basten JA unduly elevates the consideration of time and place of event over other salient considerations which ought be brought to bear in determining the meaning of "in respect of" in s35, and obscures consideration of whether primary liability to non-passengers is one of the areas which the Conventions and the CACL Act seek to regulate.

39. Once one properly eschews directing attention purely toward temporal issues, it becomes apparent that a nervous shock claim by a non-passenger following the death of the passenger is not pre-empted by s35(2), because:

    a. the claim is one of primary, rather than derivative, liability, and

    b. this accords with a proper understanding that the CACL Act and Convention are fundamentally seeking to regulate carriers' contractual relationships.

The Nature of Nervous Shock Claims

40. The majority of the Court of Appeal proceeded on the observation that s35, embracing claims following the death of a passenger, necessarily contemplates a non-passenger bringing a claim against a carrier. It is extrapolated from this that claims by non-passengers are exclusively provided for, in light of the "exclusivity principle", within Part IV. This argument fails to observe the range of non-passenger liabilities with which the Conventions and CACL Act do not deal, discussed above.

41. Moreover, the approach of the majority fails to give appropriate weight to the fact that a nervous shock claim by a non-passenger under s35 is not a derivative form of claim hinging upon the death of a passenger, but instead a form of primary liability arising from an independent duty of care.

42. As observed by Sackville J in *Magnus* at 346D - 347A, the fact that some claims under the *Warsaw Convention* might be made by non-passengers does not necessarily mean that it is concerned to eliminate all claims for non-passengers, as

the above examples highlight. As Sackville J states, "it is by no means obvious that they had in mind non-derivative claims, such as that by a passenger alleging nervous shock by reason of seeing an aircraft crash or learning that a passenger had been killed, injured or placed in peril".

43. Regard to the wording of s35 suggests that it is directed toward endeavouring to regulate compensation to relatives claims. At [291] Leeming JA provides an analysis of the textual similarities between the provisions of s35 and the *Compensation to Relatives Act 1897* (NSW). A similar analysis is made by Hill J in *Magnus* at 320D - E. Moreover, as identified by Leeming JA at the conclusion of [291], and by Allsop P at [45] - [48] and [70] of *Sercel*[5], Art 24 in the Conventions was intended to cover claims in the nature of compensation to relatives claims, but leave to the domestic legislation of the signatory nations the determination of the identity of claimant and the form of the claim.

44. The second reading speech to the CACL Act similarly contains no indication that the drafting of the section was intended to extend beyond compensation to relatives claims. In the circumstances, the analysis of Basten JA at [110] - [111] does not withstand scrutiny. The argument is not assisted by reference to the words "by reason of" in s28, which are further relational terms in the same category as "in respect of", and thus advance the argument no further.

45. That a compensation to relatives claim is entirely covered by the "exclusive code" under the CACL Act is unsurprising, as noted by Leeming JA at [287] and [291]. That cause of action is inevitably derivative of a liability to the deceased. That is, the cause of action does not arise because of any injury done immediately to the relative of the deceased party, but is compensation for the death itself. The right to compensation in circumstances of such a claim is contingent on there first being a liability between the defendant and the deceased. Thus one could reasonably expect that if the primary liability to the deceased is extinguished, so is the derivative action of any dependents. The measure of damages for compensation to relatives is

[5] *United Airlines Inc v Sercel Australia Pty Limited* (2012) 260 FLR 37

similarly derivative, dependent upon the extent of the defendant's earnings and service provision.

46. However, a nervous shock claim by a non-passenger against a carrier following the death of a passenger would not, at common law, be equivalently derivative. The cause of action for nervous shock is predicated upon the existence of a duty of care owed independently to the claimant. The damages from a successful action for nervous shock are equally independent, the measure of the loss being the harm caused directly to the claimant, rather than the person injured or killed. This is a distinction which is not recognised by Basten JA. To the contrary, at [118] it is suggested that an essential element of the nervous shock claim is the death of the passenger is an essential element of the cause of action. As explained by Leeming JA at [288], consistently with *Jaensch v Coffey* (1984) 155 CLR 549, whilst this may be a factual element of a nervous shock claim, it is not an element of such a tortious claim in the true sense.

47. As identified by Leeming JA at [327], once it is acknowledged that a non-passenger action for nervous shock against a carrier premised upon the death of a passenger is a form of primary liability, and that other forms of primary liability in non-passengers arise in a carrier which are not caught by the preemptive effect of the Conventions or CACL Act, it is difficult to see why nervous shock claims of the nature made by the Stephenson family should be considered any differently. The view adopted by Leeming JA in this regard is:

    a. Supported by the reasoning of Sackville J in *Magnus* 344D - 346F.

    b. Supported by the absence of legislative action since *Magnus* to overcome the effect of that decision.

    c. Consistent with the second reading speech for the CACL Act, which bears no reference to direct psychological claims by non-passengers, rather to actions by dependents.

48. The majority eschews consideration of the distinction between derivative and non-derivative liability because they consider this must give way to the focus upon the timing and place of the event giving rise to injury. Basten JA further resists consideration of the issues raised on the basis that they are simply anomalies which necessarily arise when an international convention intersects with domestic law.

49. Whilst it may be accepted that argument by anomaly is fraught in such a context, the anomalies are better seen as the manifestation of the problems arising from a failure to distinguish between derivative and non-derivative forms of liability, rather than the source of the problem themselves. As noted by Leeming JA, in spite of fairly being described as anomalies, each of the situations which Basten JA describes at [137] - [139] nevertheless supports the construction for which the Appellant contends.

50. Moreover, at [140] Basten JA identifies a third category of anomaly which he sees as potentially more relevant. Basten JA concludes that this anomaly does not assist the construction for which the Appellant contends because it sits ill at odds with the purpose of limiting liability. As observed above, however, in the context of non-derivative actions brought by non-passengers the limitation of liability is, at best, illusory. The anomaly is best resolved a by a construction that reads "in respect of" in both s35 and s36 as not including any form of nervous shock claim by a non-passenger, thus reading them harmoniously.

51. As observed by Leeming JA, construing the operation of "in respect of" in the manner the Appellant suggests also removes any tension between the extinction of liability under s35 in circumstances such as the present, and its subsequent extension under s37.

52. The primary nature of the prospective liability to a non-passenger for nervous shock is thus supportive of the proposition that such liability should not be caught within the scope of the Conventions of the CACL Act.

Contractual basis of relationship

53. The conclusions arising from a consideration of the primary nature of the liability of a carrier to a non-passenger for nervous shock are strengthened when one considers that the basis of relationships between passengers and carriers is contractual, and that this contractual relationship underpins the operation of the Conventions and the CACL Act.

54. The Conventions and the CACL Act endeavour to address two forms of mischief which were of concern prior to the inception of the respective schemes. In particular:

    a. Carriers were concerned about the extent of their exposure for both injury or death to passengers, and for damage to cargo.

    b. Passengers, and governments, were concerned about ticketing provisions issued by carriers which excluded their liability for such damage or injury altogether, potentially leaving those harmed without remedy.

55. The Conventions thus import a compromise between carriers and passengers. Passengers were given a right of action, without having to establish fault on the part of the relevant carrier, in circumstances in which the Convention applies. The carrier is prevented from contracting out of liability, however, receives the benefit of a limitation on their liability in the event of an incident. In this context, the contractual relationship between carrier and passenger becomes essential.

56. The centrality of the contractual process to the operation of the Conventions and the CACL Act was observed by Leeming JA at [319]. In particular, in addition to the compromise discussed above:

    a. It is the contractual relationship between the carrier and passenger which will determine whether one of the CACL Acts or the Conventions applies. Passengers on the same flight may be subject to different regimes depending upon their point of origination and final destination.

b. The notification provisions (at least prior to the *Montreal No 4 Convention*) were considered essential, partly with a view to allowing the passenger to obtain additional insurance to protect against possible loss.

57. The position of a non-passenger, in this context, can be contrasted with that of the passenger. Non-passengers are self-evidently in a position in which:

a. there would ordinarily be no prospect of the carrier contracting out of liability with them;

b. they are not part of any contractual process as envisaged by the Conventions and the CACL Act, and

c. they are not subject to the notifications which the passenger receives so as to allow them to take out insurance, or take any other action.

58. The removal of the non-passenger from the contractual process tends against the proposition that they were intended to be caught within the scope of the Conventions and CACL Acts' preemptive effect. It would be an odd situation if the legal rights of a non-passenger to bring a primary claim against a carrier were affected, or potentially extinguished, by a contractual process in which they have no part.

59. When one has regard to the fundamentally contractual nature of the relationship between passenger and carrier, and the compromise between their respective interests which the Conventions and the CACL Act incorporates, the purported additional anomaly identified by Basten JA at [141] falls away.

60. The approach adopted by the majority does not properly recognise that the contract between carrier and passenger is the fundamental underpinning of the operation of the Conventions and the CACL Act, nor that a non-passenger is necessarily external to that process. The reasoning for this is primarily found at [151], where Basten JA states that argument based upon the ticketing (or contractual) provisions cannot stand

because of the position adopted in *Herd*[6]. However, as observed by Leeming JA at [335] - [338]:

a. the decision in *Herd* did not contemplate any claim by a non-passenger for psychological injury, and

b. the decision in *Herd* was interpreting British domestic legislation which disapplied the relevant provisions of the Conventions which provide the contractual underpinning.

61. In the circumstances, this contractual underpinning must inform the context in which the words "in respect of" are construed. The fact that a non-passenger will always be a stranger to the contractual process between passenger and carrier should militate against the non-passenger being affected by the preemptive scope of the Conventions or Part IV of the CACL Act.

Cauchi

62. It should be observed that in *Cauchi v Air Fiji* [2005] TOSC 7 a conclusion was reached that a nervous shock claim by a non-passenger would be caught within the operation of the Conventions. That decision considered the reasoning of the Full Court of the Federal Court in *Magnus*. As noted by Leeming JA at [348] - [349], the reasoning of the Tongan Court is unpersuasive, it involving little analysis and an invocation of a floodgates argument without apparent evidentiary backing to that proposition. The decision ought be given no weight in the interpretation of s35.

Conclusion

63. The position is thus that:

a. the majority's focus upon the timing and place of the event giving rise to injury or death is misconceived, and

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[6] *Herd v Clyde Helicopters Ltd* [1996] SLT 976

b. the range of liabilities between carriers and non-passengers falling outside of the operation of the Conventions or the CACL Act, the primary nature of the liability of a carrier to a non-passenger for nervous shock at common law, and the contractual underpinning of the Conventions and the CACL Act stand against the majority's interpretation of s35.

64. In the circumstances the appeal should be allowed.

Part VII:

65. Allow the appeal.

66. Order 8 be set aside, and lieu thereof order that the First Respondent pay the Appellant an amount by way of contribution in the proceedings brought against Parkes Shire Council by Ingrid, Jay and Natalee Stephenson of $715,582.00, such order to have effect from 12 August 2016.

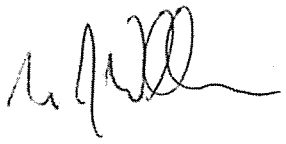
67. Orders 5(d), 6(c), and 7(c) be set aside, and in lieu thereof order that the Respondent pay the Appellant by way of contribution two thirds of the trial costs of Ingrid, Jay and Natalee Stephenson.

68. Order 9 be set aside.

Part VIII:

69. The Appellant estimates its oral argument will take approximately 3 hours.

Dated: 5 July 2018



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