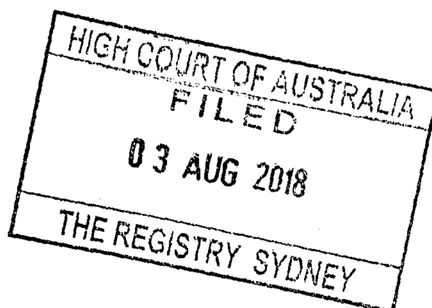
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. 140 of 2018

BETWEEN:



PARKES SHIRE COUNCIL
(ABN 96 299 629 630)
Appellant

and

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SOUTH WEST HELICOPTERS PTY LTD
(ABN 64 085 167 951)
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

1. This submission is suitable for publication on the internet.

Part II: Sole Issue

2. Does the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) **(Carriers' Liability Act)** permit of a carrier, within the meaning of that Act, being liable under common law to a close member of the family of a passenger for mental harm which results from the death of the passenger during carriage to which Part IV of the Carriers' Liability Act applies; or is such liability, if any, that which arises under s.28 of that Act?

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Part III: No Constitutional Question

3. The Respondent has considered whether any notice should be given in compliance with s.78B of the *Judiciary Act 1903*. No such notice has been given.

Part IV: No disputes of Fact

4. The Respondent does not contest the Appellant's narrative of facts but emphasises the following. *First*, the Stephensons did not bring a claim against the Respondent within the two-year limitation fixed under the Carriers' Liability Act. *Secondly*, Mrs Stephenson obtained judgment for $389,191 against the Appellant relying upon the *Compensation to Relatives Act 1897* (NSW), and the Stephensons collectively

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obtained judgments against the Appellant for mental harm under the common law of tort controlled by the *Civil Liability Act 2002* (NSW) totalling $684,182. *Thirdly*, the result of the Court of Appeal's decision upholding the exclusivity of s.35(2) of the Carriers' Liability Act was that the Stephensons obtained no judgment against the Respondent but that the Appellant obtained judgment permitted under s.37 of the Carriers' Liability Act for contribution against a co-tortfeasor to the limit set by the Act of $500,000. *Fourthly*, the Stephensons have been compensated for all their losses by the Appellant, and the Appellant has obtained contribution up to the cap of $500,000 from the Respondent. The Appellant seeks to escape that cap to increase the
10 contribution to $715,582.

Part V: Respondent's Argument

A. SUMMARY OF ARGUMENT

5. These submissions will show that:

   (a) Part IV of the Carriers' Liability Act is to be construed harmoniously with the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (**Warsaw Convention**) and its successors (the **Conventions**) to which effect is given by that Act. (**Section B** paragraphs 7 to 10);

   (b) The Conventions are construed purposively. The cardinal purpose of the
20 Conventions is to address otherwise unmanageable conflicts of laws questions by prescribing a uniform international code for the liability for harm arising from, among other things, death or injury to passengers that occurs during international carriage. (**Section C** paragraphs 11 to 18);

   (c) The key elements of that code are the prescription of the sole basis of a carrier's liability, a cap on the total damages that may be payable in discharge that liability, the extinguishment of the liability if not sued upon within two years and the countries in whose courts such liability may be asserted. (**Section D** paragraphs 19 to 34);

   (d) The Conventions are concerned only indirectly and consequentially with the
30 rights of passengers or of those who may claim through or because of the harm to passengers. They leave to the domestic law of the country in which suit is brought pursuant to the permission of the Convention (including any domestic conflict of laws rules), the prescription of who may sue; for what forms of harm

they may sue; under what legal theory they may sue and the manner of division between them of the damages available up to the prescribed cap. The matters left to domestic law do not affect the uniform operation of the code in defining the international carrier's liability. (**Section E** paragraphs 35 to 50);

(e) The absence of a prior example in the international case law dealing with the precise form of harm asserted in the present case cannot support a departure from the meaning of the Conventions. A comparative torts analysis demonstrates that the liberal approach to mental harm damages for secondary or *ricochet* victims such as the Stephensons based on decisions of this Court in *Jaensch v Coffey*[1]

10 and *Tame v New South Wales*[2] is unusual. (**Section F** paragraphs 51 to 53);

(f) While the cardinal purpose of the Conventions is to address conflicts of laws and those issues do not arise in domestic Australian aviation, Part IV and in particular s.35(2) construed on their terms operate harmoniously with the Conventions. Conversely, a construction which is inconsistent with the exclusive code of the Conventions, and not positively mandated by the language of the Carriers' Liability Act is to be avoided because it would place Australia in contravention of its obligations under the Conventions and outside a clear international consensus as to their meaning and effect. (**Section G** paragraphs 54 to 74); and

(g) the Appellant's case, and the reasons of Leeming JA, miscarry by addressing the

20 questions through the prism of the nature of the claim asserted by the Stephensons; an emphasis on a 'derivative/non-derivative' distinction that finds no support in the Conventions or the Carriers' Liability Act and a false extrapolation from the contractual nature of the carriage to the liabilities exclusively governed. The decision in *South Pacific Air Motive v Magnus*[3] was affected by those same errors, was wrongly decided and should be overruled. (**Section H** paragraphs 75 to 79).

6. Overall, construed both on their terms and harmoniously with the Conventions, the provisions of the Carriers' Liability Act have the effect that:

The civil liability of a carrier, in the event that damage is sustained by the death of a

30 *passenger in the course of carriage to which the Act applies, is imposed exclusively by*

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[1] (1984) 155 CLR 549.

[2] (2002) 211 CLR 317.

[3] *South Pacific Air Motive Pty Ltd & Anor v Magnus, Kenneth & Ors* (1998) 87 FCR 301 (***South Pacific Air Motive***).

the Carriers' Liability Act or (which is the same thing) is in every case subject to the conditions and limits of that Act; whoever be the claimant, whatever be the type of harm asserted, and whatever be the legal theory by which the liability is said to be imposed.

B. THE CONVENTIONS INFORM THE CONSTRUCTION OF THE ACT

7. The Appellant accepts (AS [17]), as each of the Judges below did, that the provisions of Part IV of the Carriers' Liability Act should be construed to operate harmoniously with their international counterparts. That is consistent with authority in this Court.[4]

8. That s.35 is to be so construed is confirmed by the terms of ss.12, 24 and 25L of the Carriers' Liability Act.

9. Section 12 mirrors the terms of s.35 except that it operates in relation to liability imposed by the Warsaw Convention as amended at the Hague while s.35 operates in relation to liability imposed by Part IV of the Carriers' Liability Act. Section 24 applies the terms of s.12 to liabilities imposed by the original Warsaw Convention.[5] Section 25L operates with respect to liabilities imposed on carriers pursuant to the Montreal No. 4 Convention. It applies the text of ss.35 to 39 of the Carriers' Liability Act on the basis that any reference in those sections to Part IV of the Act is taken to be a reference to the Montreal No. 4 Convention.

10. As a consequence, s.35 is to be construed harmoniously with the Conventions. Any departure from the meaning and effect of the Conventions in the construction of s.35(2) will result in Australia's implementation of those Conventions, insofar as it is effected by ss.12, 24 or 25L of the Act, departing from Australia's obligations under those Conventions.[6]

C. THE CARDINAL PURPOSE OF THE CONVENTIONS

11. **Principles of construction:** The text of the relevant Conventions is as set out in the Schedules to the Act, except to the extent that there is any inconsistency between that

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[4] *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 270 [54] (***Agtrack***); see also Kirby J in *Air Link Pty Ltd v Paterson* (2005) 223 CLR 283 at 303 [49] (***Air Link***).

[5] With the amendment to the special costs regime provided for in paragraph 4 of Article 22 of the Warsaw Convention referred to in s.12(11) given operation in respect of claims under the Warsaw Convention as amended at The Hague.

[6] The same result would follow with s.9D (although this section was not in force at the time of the accident) and Australia's conformance with the Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signature at Montreal on 28 May 1999 (**Montreal 1999 Convention**).

text and the text that would result if the authentic French texts were read and interpreted together as one single instrument.[7]

12. In interpreting the Conventions, the principles of construction are well established. In *Povey v Qantas Airways Ltd*[8] the plurality identified the guiding principles within the Vienna Convention and referred to the important principle that international treaties should be interpreted uniformly by contracting States.

13. Article 31 of the Vienna Convention requires that a treaty be given its ordinary meaning in the context and in light of the object and purpose of the treaty. The Conventions are to be construed purposively with specific words construed to have a meaning consistent with the shared expectation of the contracting parties.[9]

14. The Conventions are framed for application in private law disputes by the domestic Courts of the State Parties which exercise jurisdiction in accordance with the Conventions' terms.[10] The decisions of those Courts are relevant to achieving uniformity of interpretation and as evidence of subsequent state practice – the "growth of the Convention."[11] The substantive provisions are to be read in the context of the national legal systems of all member states.[12]

15. **The purpose of the Conventions**: The primary and cardinal function of the Warsaw Convention is to achieve uniformity in the law relating to liability of international air carriers.[13] So much is reflected in the title of the Convention. The terms of the Convention are to be construed as an international code for air carriage because without such a code the substantial difficulties occasioned by conflicts of laws governing liability arising from a single episode of international flight would be unmanageable, a "*jungle like chaos*".[14]

16. The Warsaw Convention, in terms, identifies those rules applying to international carriage by air which are <u>not</u> unified: the provisions of Articles 12, 13 and 14

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[7] Section 8(1) and (2).
[8] (2005) 223 CLR 189 at 202 [24] and [25] (***Povey***).
[9] *Sidhu v British Airways Plc* [1997] AC 430 at 442C (***Sidhu***); *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1998) 525 US 155 at 167 (***Tseng***); *Thibodeau v Air Canada* [2014] 3 SCR 340 at 365 [35] (***Thibodeau***).
[10] Warsaw Convention Art.28 identifies the fora the Courts of which have jurisdiction.
[11] See Mankiewicz: <u>The Liability Regime of International Air Carriage</u> (Kluwer, 1981), pages 22 –23 (**Mankiewicz**).
[12] *Reed v Wiser* (1977) 555 F 2d 1079 at 1083 (***Reed***).
[13] *Zicherman v Korean Air Lines Co* (1995) 516 US 217 at 230 (***Zicherman***); *Tseng* at 169; *Thibodeau* at 367 [41].
[14] Per Greene LJ in *Grein v Imperial Airways Ltd* [1936] 2 All ER 1258 at 1278 (***Grein***); *Reed* at 1090–1092.

concerning relations between consignors and consignees under air waybills may be varied by express provision in the air waybill (Article 15(2)); local requirements to meet the formalities of customs, octroi or Police must be met by the consignor of cargo (Article 16(1)); where the law of the forum provides for payment of damages by periodical payment that may occur, within the liability caps prescribed (Article 22(1)); in cases concerned with damage sustained in the event of the death, wounding or other bodily injury of a passenger the questions as to who are the persons who have the right to bring suit and what are their respective rights are reserved to the law of the forum (Article 24(2)); while there is a uniform rule for prescribing the fora whose courts will have jurisdiction in any case, the Convention leaves it to the plaintiff to choose between those fora (Article 28(1)); the method for calculating the period of limitation, which is fixed at 2 years, is to be determined by the law of the fora (Article 29(2)); experimental and special air navigation services may be excluded (Article 34).

17. In addition to the matters identified in the previous paragraph, Mankiewicz correctly notes that the Conventions do not deal with the legal capacity of the parties to the contract, various matters concerning contract formation, the rights and obligations of the passenger or generally the rights and obligations of the consignor of goods or baggage.[15]

18. By reference to the cardinal purpose of the Conventions and the matters to which reference is made in the two preceding paragraphs, the reference to "certain rules" in the title of the Warsaw Convention provides no warrant to read down any of their express terms. In those areas with which they deal they are intended to create a uniform code and to be exclusive of any resort to the rules of domestic law.[16]

D THE KEY ELEMENTS OF THE CONVENTIONS

19. **The relevant provisions:** Article 17 of the Warsaw Convention in the official French reads:

> *Le transporteur est responsible du dommage survenu en cas de mort, de blessure ou de toute lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.*

20. The English translation of that Article is as follows:

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[15] Mankiewicz, page 13.
[16] *Sidhu* at 453D.

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

21. Article 24 of the Warsaw Convention in the official French reads:

(1) *Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.*

10 (2) *Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.*

22. The English translation of that text is as follows:

(1) In 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 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.

20 23. **Event based liability**: The liability created (or the regulation of liabilities prescribed[17]) by Article 17 is event based. It is a liability for "damage sustained" (*dommage survenu*). That is for harm done to some person, not legal damages. The liability for such harm arises in the event of the death, wounding or other bodily injury of or to a passenger if the damage is caused by an accident[18] and the accident occurs on board the aircraft or in the course of embarking or disembarking.

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[17] The only practical significance of the dispute that occurred within and between Circuit Courts in the United States concerning whether Article 17 regulates causes of action under domestic law or creates a cause of action or both was on the operation of state conflict of laws rules. It was of no consequence otherwise. See *In re Mexico City Air Crash* (1983) 708 F 2d 400 at 409 – 412 (9th Circuit); *In re Korean Air Lines Air Disaster* (1983) 932 F 2d 1475 at 1488 (D.C. Circuit) (***Korean Airlines***); and *In re Air Disaster at Lockerbie* (1991) 928 F 2d 1267 at 1273 (2nd Circuit). The Supreme Court's subsequent decision in *Zicherman* shows that the Conventions create a cause of action and the issue has not since re-emerged: Mankiewicz, page 140 – 141; Miller: Liability in International Air Transport - The Warsaw System in Municipal Courts (Kluwer, 1977), pages 227 to 231 (**Miller**).

[18] The meaning of "accident" was addressed in *Povey* at 204 to 208, [32] to [45], applying *Saks v Air France* (1985) 470 US 392.

24. The text of Article 17 shows that *first*, there is no limitation as to the person or persons who sustained damage for which a carrier is liable; *second*, there is no requirement that the carrier cause the death or personal injury of the passenger; *third*, there are two matters which control the scope of liability: that the damage is sustained in the event of (cf caused by) the death or injury to the passenger, and that the damage is caused by an accident that occurs in the course of carriage; *fourth*, apart from those two limitations there is no limitation on the damage which grounds the carrier's liability, including no limitation by reference to the nature of damage or heads of damages; and *fifth*, the reference to "*dommage*" does not mean "damages" but rather refers to legally
10 cognizable harm done.[19]

25. Read with Articles 20 and 21, Article 17 operates to presume the carrier is at fault.

26. **Exclusivity of liability**: The word "*cas*" when used in Article 17 has been translated in the English version to mean "event" whereas, when used in Article 24(1) and (2) is translated to mean "cases". The word does not mean "case" in a juridical sense but means "event" or "case" in the non-juridical sense. The United States Court of Appeal for the Second Circuit reasoned that a less ambiguous rendition of Article 24 might be:

> (1) In the events anticipated in Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits
> 20 set out in this convention.
>
> (2) In the events covered by Article 17 the provisions of the preceding paragraph shall also apply.[20]

27. While the precise translation need not be further addressed, the two important points that emerge are that:

    (a) the reference in Article 24(2) to the cases covered by Article 17 is <u>not</u> to legal claims covered by Article 17; and

    (b) the correct construction is that Article 24(1) is applied by Article 24(2) to the <u>events of the death, wounding or bodily injury</u> of a passenger in the course of carriage.

30 28. In the Montreal No. 4 Convention, Article 24 is clarified relevantly to read:

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[19] *Zicherman* at 223 to 224.

[20] *Reed* at 1084.

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, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights [emphasis added].

29. In *Tseng* the parties agreed that Article 24 in the Montreal No. 4 Convention was clear in its pre-emptive effect in precluding passengers from bringing actions under local law when they could not establish air carriage liability under the treaty. The Court correctly held that the revised Article merely "clarified" and did not alter the meaning or scope of the Warsaw Convention's rule of exclusivity.[21]

10 30. Article 22 of the Warsaw Convention imposes a cap on damages which may be awarded and Article 23 prevents a carrier from contracting out of its liability under the Convention. Article 28 prescribes the fora in which an action for damages may be brought. Article 29 extinguishes[22] any right to damages if an action is not brought within two years.

31. **The negotiating history:** That Article 24 would operate to exclude common law damages claims arising out of the death or injury to the passenger is consistent with the negotiating history. At the penultimate negotiating session of the Warsaw Convention, the delegates agreed to separate out the Articles providing for liability for death or injury to passengers, destruction loss or damage to baggage or goods and
20 delay into separate Articles 17, 18 and 19.[23] When the Convention came, later that evening, to consider Article 24 the proposed Article read relevantly:

In the cases provided for in Article 17, even in the case of death, any liability action however founded can only be brought under the conditions and limits provided for by the present Convention, without prejudicing the determination of those persons who have the right to act, and without prejudicing their respective rights.

32. In the ensuing discussion, the delegates recognised that the draft of Article 24 no longer worked effectively with the separate Articles 17 to 19 and decided to refer the separation of Article 24 to the Drafting Committee. In that discussion Sir Alfred Dennis, representing Great Britain, Australia and the Union of South Africa,
30 commented on the proposed Article 24(1):

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[21] *Tseng* at 175.

[22] Note this is a true extinguishment of the liability, not a mere bar on suit. *Agtrack* at 268 [51].

[23] Horner and Legrez: Second International Conference on Private Aeronautical Law Minutes Warsaw 1929 pages 205 to 207; cf. Art. 21 of the earlier CITEJA draft, page 264 (**Horner and Legrez**).

It is a very important stipulation which touches the very substance of the Convention, because this excludes recourse to common law...[24]

33. Two evenings later, at the final meeting of the Convention, Article 24 as now in force was adopted with the President of the Drafting Committee commenting that it constituted a "*strengthening of wording*" that was "*entirely satisfactory*".[25]

34. That history supports giving to Article 24 the full effect of the words used.

E. THE MATTERS LEFT TO DOMESTIC LAW BY THE CONVENTIONS

35. **General:** On its terms, and with the correct understanding of "*cas*", Article 24 of the Warsaw Convention operates to impose the conditions and limits in the Convention on any action for damages however founded arising out of the events of the death, wounding or bodily injury of a passenger in the course of carriage.

36. Specifically, the "without prejudice" clause of Article 24 expressly reserves to domestic law the identity of plaintiffs; the heads of damage for which they may sue; and the legal theory on which they may sue for damage, but all as part of the Convention established liability. It leaves no room to sue under domestic law outside or other than under the Convention liability.

37. ***Zicherman* illustrates the correct approach:** In *Zicherman*, the Supreme Court considered a non-passenger claim. The sister and mother of a decedent who had been on board KAL flight 007 when it was shot down over the Sea of Japan sought to recover damages for their grief and mental anguish, the loss of the decedent's society and companionship and for the decedent's conscious pain and suffering. Scalia J, writing for the Court, referred to the extremely wide range of phenomena to which "*dommage*" could potentially be applied. He held that "*dommage*" in Article 17 means no more than "legally cognizable harm", with Article 17 then leaving it to the domestic law of the adjudicating courts to specify what harm is cognizable.[26] The last clause of Article 24 confirmed that the law of the Convention did not affect the substantive questions of who may bring suit and for what harms they may be compensated.[27] Scalia J reviewed the relevant negotiating record and post-ratification conduct of the contracting parties. That record included one passage explaining the reservation in

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[24] Horner and Legrez, page 213.
[25] Horner and Legrez, page 229.
[26] *Zicherman* at 223–244.
[27] *Zicherman* at 225.

Article 24 without any reference to death claims and a further passage which did refer to death claims. In either case, these matters are to be left to domestic law.[28]

38. That reasoning shows that the liability imposed by Article 17, and then capped, made exclusive and subject to early extinguishment by the subsequent Articles, extends to liability for harm,[29] including purely psychological harm done to third parties, but whether any person can recover damages for that harm is left to domestic law.

39. Scalia J then turned to the domestic law question whether the decedent's wife and daughter could recover their claimed non-pecuniary losses.[30] Within the United States legal system, the governing law was the *Death on the High Seas Act* which permitted the plaintiffs to recover for only pecuniary losses. Had a more generous domestic law rule applied, Scalia J's reasons indicate that there would have been no difficulty in the decedent's wife and daughter recovering damages, including for their grief and mental anguish, under a cause of action sourced in the Convention as a result of the death of their husband and father.

40. ***Tseng***: In *Tseng*[31] Ginsberg J, writing for the court, explained that *Zicherman* acknowledged that the Convention endeavoured to "*foster uniformity in the law of international air travel*" and relevantly did so by resolving *whether there is liability* but left to domestic law the determination of the compensatory damages available to the suitor.

41. The precise issue in *Tseng* was whether a passenger would be precluded from recovering damages for purely psychological injury when Article 17 imposed no liability on the carrier unless there had been 'bodily injury' caused by an 'accident' on board. However, the dispositive reasoning was broader and turned upon the construction of Article 24(2) and did not depend upon the case being by a passenger.

42. El Al Israel Airlines Ltd and the United States had submitted that "*les cas prévus â l'article 17*" referred generically to all personal injury cases stemming from occurrences on board an aircraft or embarking or disembarking. In contrast, Mr Tseng had submitted that the phrase referred only to those cases in which a passenger could actually maintain a claim for relief under Article 17. The court adopted the El

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[28] *Zicherman* at 226–228.
[29] Liability does not extend to punitive damages, because *"dommage"* contemplates only compensatory damages: *Re Air Crash off Point Mugu* (2001) 145 F Supp 2d 1156.
[30] *Zicherman* at 228–232.
[31] *Tseng* at 170.

Al/United States construction.[32] That construction made no reference to the identity or capacity of any plaintiff and was expressly event based: "*occurrences on board an aircraft*". The Supreme Court noted that its decision on the question before it was to the same effect as that of the House of Lords in *Sidhu v British Airways Plc*.[33]

43. **International consensus**: There is now a broad and deep international consensus that the reasoning in *Tseng* is correct. In *Stott v Thomas Cook Tour Operators Ltd* [34] Lord Toulsen JSC wrote the leading judgment. He reasoned by reference to the court's construction of Article 17 in *Tseng* to which reference is made above[35] and to the reasoning of Sotomayor CJ, as her Honour then was, in *King v American Airlines Inc*[36] which explained the event based exclusory effect of Article 17 as identified in *Tseng* as directing attention to "*when and where an event takes place in evaluating whether a claim for an injury to a passenger is pre-empted so that the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered.*"

44. In *Thibodeau* Cromwell J wrote the leading judgment for the Canadian Supreme Court. While that case turned on the Montreal 1999 Convention, Cromwell J reasoned by reference to those parts of Article 29 of the Montreal 1999 Convention which are in the same terms as Article 24 of the Warsaw Convention as Amended at the Hague and by Protocol No. 4 of Montreal 1975 (**Montreal No. 4 Convention**). He held that the Article provides that *all* actions for damages in the carriage of passengers, baggage and cargo are subject to the conditions and limitations of liability set out in its provisions. That reasoning is not constrained by reference to the identity of the plaintiff.[37]

45. The breadth and depth of the international consensus extends beyond final Courts of Appeal and beyond questions of preclusion of passengers' claims for nervous shock or discrimination damages.[38]

46. **Subsequent state practice:** The parties to the Conventions have implemented the Conventions by adopting a variety of legal techniques providing for who may sue and

[32] At 168–169.
[33] [1997] AC 430.
[34] [2014] AC 1347 (***Stott***).
[35] *Stott* at 1371 [38].
[36] (2002) 284 F 3d 352 at [33]–[35].
[37] *Thibodeau* at 365 to 367 [37] to [40].
[38] See the citations in *Stott* at [44] (noting the reference to *South Pacific Air Motive* is an error) and *Thibodeau* at [56]. See also *Reed*; *Korean Airlines*; *In re Bali Air Crash* (9th Circuit) (1982) 684 F 2d 1301 at 1308 [10] and *Doe v Etihad Airways* (6th Circuit) (2017) 870 F 3d 406.

the damages which they may recover but recognising throughout that the liability remains a Convention established one.

47. France has no specific provision dealing with the matters reserved by Article 24(2). A contract of carriage includes a stipulation in favour of persons to whom the passenger owes a duty of assistance. Dependents of the deceased generally inherit the rights of action which the deceased possessed at the time of death and can therefore sue on the contract, and in addition may be entitled to personal quasi-delictual damages. Those damages include moral damages.[39] Nevertheless the French courts will not permit a delictual action in cases to which the Conventions apply to prevent avoidance of the
10 limitations of liability provided by the Conventions.[40]

48. Germany makes specific provision for those who may sue under the Convention in the event of the death of a passenger and the damages which they may obtain. Relatives of a deceased passenger may sue, with the damages limited to those caused by the loss of the relative's alimentary claim against the decedent.[41]

49. The United States determines the persons who may sue and their respective rights in the event of death of a passenger by reference to the wrongful death legislation of their respective States[42] and where applicable Federal damages provisions such as the *Death on the High Seas Act*.[43]

50. England (upon whose Act Australia's is modelled) provides for dependent relatives of
20 a deceased passenger to sue, and for recovery by them of damages, as under the *Fatal Accidents Act 1976*.[44]

F. COMPARATIVE TORTS ANALYSIS

51. It is convenient at this point to address domestic laws of other countries concerning recovery of damages by secondary victims for mental harm. French law of delict provides compensation for mental harm if it constitutes *dommage*. There is no requirement of a psychiatric injury. *Dommage* to a *victime par ricochet* is well recognized.[45] German law provides compensation for psychiatric injury to close relatives arising out of a death but denies compensation for grief and sorrow following

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[39] Haanappel: "The right to sue in death cases under the Warsaw Convention" (1981) 6 Air Law No. 2 66, page 73 (**Haanappel**).
[40] Haanappel, page 74.
[41] Haanappel, page 75.
[42] Haanappel, pages 76 to 77.
[43] As applied in *Zicherman*.
[44] Haanappel, page 72.
[45] van Dam: European Tort Law (2nd Ed) (Oxford University Press, 2013) pages 176–177 (**van Dam**).

the death.[46] English, Scottish and Canadian law denies compensation for mental harm to secondary victims who do not witness the death, danger or injury to the primary victim.[47] The states of the United States generally deny compensation for mental harm to secondary victims who are not in the "zone of danger" at the time of the injury to the primary victim,[48] while some provide substantial damages in wrongful death actions for loss of society, grief and anguish caused by death.[49] South Africa, Ireland, New Zealand and Singapore's approach to compensation for mental harm is analogous to Australia's as it has applied since the Civil Liability Acts.[50]

52. The requirement of a separate cause of action based upon an independent duty of care for recovery of damages for mental harm incurred by learning of the death or injury of another does not exist in civil law. The point of delineation between compensation to relatives claims and survival claims and what damages may be recovered by the surviving relatives of a decedent under them differ between common law jurisdictions.[51] The liberal approach taken in Australian domestic law to the circumstances in which damages are recoverable in tort for mental harm caused by learning of the death of a relative is unusual in common law jurisdictions, although not unique from a comparative torts perspective.

53. The submissions at AS [39] and [45] and Leeming JA's reasons at CA [285] to [288] incorrectly attribute meaning to the Conventions by reference to the particular form of wrongful death claim recognized in Australian law and Australia's unusual approach to compensating secondary victims for mental harm. The construction of the Conventions and therefore Part IV is to be undertaken in a broader context of the legal systems of the various State Parties to the Conventions.

G. THE CONSTRUCTION OF PART IV

54. **General**: None of the conflict of laws issues which resulted in the Conventions being adopted could arise when interstate or intrastate carriage occurred within Australia. However, the Carriers' Liability Act was enacted to give effect to the Conventions, including by extending the Conventions' uniform code of carriers' liability to

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[46] van Dam, pages 177–178.
[47] Handford: Tort Liability for Mental Harm (3rd ed) [3.20] to [3.430] and [3.560] to [3.630] (**Handford**).
[48] Handford [3.760] to [3.790].
[49] For example, $500,000 awarded in *Jones v Korean Air Lines Co* (1993) 836 F. Supp 1340.
[50] Handford at [3.440] to [3.550], [3.640] to [3.720].
[51] Haanappel at 70.

domestic, interstate carriage.[52] The consequence is that Part IV is to be construed by reference to a purpose to which it is not, in isolation, directed. The Appellant and Leeming JA, in error, each ignore that purpose.

55. Section 35(2) of the Carriers' Liability Act provides for liability under Part IV of that Act to be in substitution for other civil liabilities of the carrier *in respect of* the death of a passenger in the course of travel.

56. Mirroring Article 24 of the Convention, s.35(2) renders Part IV the sole source of liability under Australian law in respect of the death of a passenger.[53] That liability is imposed by s.28.[54] Basten JA below proceeded, correctly, on the basis that the liability imposed by s.28 extends to liability for damage done to third parties.[55] It was unnecessary for him to decide whether the forms of damage for which third parties could recover under Australian domestic law extended to mental harm in circumstances where the Stephensons did not bring any claim against the Respondent within the two year period. The only matter here to decide was whether the civil liability which the Stephensons were seeking to assert under a law other than s.28 of the Carriers' Liability Act satisfied the test in s.35(2) of the Act. That question could be answered whether or not s.35(8) provided for the Stephensons to recover the head of damages claimed – a question that did not need to be decided because it was common ground that any claim under s.28 was extinguished for being out of time under s.34 and in any event could have no practical effect because the liability cap in s.31 had been reached.

57. Even if s.28 does not impose liability for mental harm caused to the Stephensons, the appeal must be dismissed once the appropriate construction is adopted, consistent with the natural meaning of the words of s.35(2) and giving to Part IV an operation consistent with its purpose and harmonious with the international Conventions to which the Carriers' Liability Act gives domestic legal effect.

58. **Section 28:** The elements of the liability imposed upon a carrier by s.28 mirror those in Article 17.

[52] Second reading speech of Mr. Townley, House of Representatives Hansard 7 April 1959, pages 903 to 908.
[53] *Agtrack* at 257 [4] and [6].
[54] *Agtrack* at 270 [59]; *Air Link* at 297 [21].
[55] CA [108]–[109].

59. The liability imposed by s.28 is capped at, relevantly, $500,000 "*in respect of each passenger*" by s.31. That formulation is broad enough to impose a single cap for a liability owed to multiple parties.

60. The right of any person to damages (cf damage) under s.28 is extinguished by s.34 if an action is not brought by that person within two years after the date of arrival of the aircraft at its destination. The formulation is not restricted to passengers or persons claiming through passengers.

61. In the case of death of the passenger, s.35(6) provides for family members and others to bring a single proceeding for damages. It shows that the liability imposed by s.28 must extend to third parties. Section 35(4), (7) and (8) prescribe what damages are available to be recovered by those third parties; and s.35(5), (9) and (10) define the rights as between the parties who may claim. Basten JA found it unnecessary to decide whether the available heads included mental harm.[56] In the event of injury to a passenger, the questions of who may sue, and for what damages, are governed by the laws of the States and Territories applied by ss.79 and 80 of the *Judiciary Act 1903*.[57]

62. **Section 35(2):** The following are to be noticed concerning the text of s.35(2). *First*, "in respect of" connects two matters: the "civil liability of the carrier" on the one hand and, relevantly, the death of the passenger on the other.

63. The Appellant at AS [41] and [42] and Leeming JA at CA [282] and [283] commence their analysis from a different and incorrect starting point: the relationship between the plaintiff's claim and the passenger's death.

64. *Second*, s.35(2) provides for the civil liability imposed on a carrier under Part IV of the Carriers' Liability Act to be "*in substitution for*" other forms of civil liability. Those other forms of civil liability are those which arise "*under any other law*". "*Any other law*" comprehensively describes every basis, and every legal theory, which might ground a carrier's civil liability other than the provisions of Part IV.

65. It is improbable that the general relational phrase "in respect of" when used immediately following "any other law" operates to cut back those other laws under which liability is imposed on a carrier to which the section otherwise refers – but the Appellant's case and Leeming JA's reasons turn on the Stephensons' claim being based upon another law – the common law of New South Wales.

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[56] CA [111] and [132].
[57] *Agtrack* at 258 [8].

66. *Third,* the liability of the carrier which is substituted for the liabilities defined by reference to "in respect of" are those imposed "under this Part." Civil liability is imposed under Part IV by s.28 and limited by ss.31 and 34.

67. The cap imposed by s.31 and confirmed by the concluding paragraph of s.37, and the extinguishment of actions effected by s.34, in terms affect "*the liability of the carrier under this Part*" and "*the right of a person to damages under this Part.*"

68. **Section 37**: Section 37 provides that nothing in Part IV should be deemed to exclude any liability of a carrier to indemnify an employer or any other person in respect of a liability in the nature of workers' compensation or to pay contribution as between
10 tortfeasors. Section 37 is to be given meaning and effect. For that to occur the liability imposed upon the carrier by s.28 needs to extend to a liability under such an indemnity or by contribution as a tortfeasor. The phrase "*in respect of*" in ss.37(a) and 37(b) mirrors the usage in s.35(2) and the same phrase in the concluding words of s.37 mirrors the language in s.31. What is achieved by s.37 is a partial relaxation of the strictures of s.28 by preserving the principles governing indemnity or contribution under the general law. The liability however is imposed by s.28 and governed by the s.31 cap. In the present case in the application of s.37 the Appellant was a tortfeasor, "*liable in respect of the death of*" Mr Stephenson under each of the Compensation to Relatives and nervous shock claims. Contrary to Leeming JA at CA [328] and to AS
20 [51], there is nothing odd or productive of tension in that.

69. The natural meaning of the words of s.28 extend to damage sustained by third parties. As a result of s.28 imposing a liability for damage sustained by third parties, s.37 has a clear purpose and effect: to provide that, notwithstanding that breadth of operation of s.28, it does not operate to exclude a liability to indemnify the person liable to pay workers compensation that is imposed by another law or to contribute to a joint tortfeasor where that liability is imposed by another law. If s.28 imposes a liability to employers who sustain damage, it must impose a liability to family members who sustain damage arising out of the same event.

70. **Part IV is an exclusive code**: The correct construction of s.35(2) (and s.36) is broader
30 than precluding claims for liabilities imposed by s.28. Harmoniously with the Conventions, those provisions together with ss.31, 34 and 37 provide the exclusive code of a carrier's civil liability for damage sustained in the event of death or personal injury to a passenger in the course of travel. Even if the Stephensons' nervous shock

claims would not have been available under s.28 (although this is an issue which does not need to be decided) that result is in conformance with the international case law which confirms the area of exclusion can be greater than the area of liability.[58] "In respect of" connects liabilities under other laws with those deaths (for the purpose of s.35(2)) and injuries (for the purpose of s.36) which occur in the circumstances to which s.28 applies. The relationship between the carrier's asserted liability under the "other law" and the death to which "in respect of" refers is an event based relationship: that the asserted liability has as an element in fact the death or injury of a passenger in the course of carriage.

10 71. **A narrower case:** Even if s.35(2) does not have the effect identified above at paragraph 56, Basten JA was correct to conclude that it precluded liability to the Stephensons for mental harm. The relationship between the civil liabilities of the carrier under any other law referred to in s.35(2) and the death of the passenger referred to in that section must be such as to result in a harmonious operation of ss.28 and 35(2).[59] Such a harmonious operation requires at least that the substitution by s.35(2) of the liability under s.28 for civil liability under any other law be at least as extensive as the basis for imposition of liability by s.28. That requires that a civil liability under any other law be "in respect of" the death of the passenger at least when damage is sustained by any person by reason of (ie in the event of) the death of a passenger within

20 the meaning of s.28, and when that death resulted from an accident in the course of carriage.

72. **Application to present case**: In this case the civil liability to the Stephensons found at trial was a liability which:

(a) in fact was based on the death of Mr Stephenson which occurred when he was a passenger in the course of carriage to which the Carriers' Liability Act applied; and

(b) was not based on any act or omission of the carrier, other than causing by its negligence the death of Mr Stephenson.

73. If it matters, the Appellant at AS [46] is incorrect to submit that the death of the

30 passenger is not an essential legal element of the nervous shock claims made by the Stephensons. That submission needs to accommodate the narrowing of nervous shock

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[58] *Tseng*; *Stott*; *Thibodeau*; *Sidhu*.

[59] Likewise between the injury to a passenger under s.28 and any law in respect of the injury in s.36.

by the enactment of s.30 of the *Civil Liability Act 2002* (NSW). The liability in this case was asserted in respect of someone who was killed and the application of s.28 to someone who feared or apprehended their death does not need to be decided.

74. The matters identified in the previous two paragraphs show an immediate and direct relationship between the liability of the carrier and the death of the passenger.

H. OTHER ERRORS OF THE APPELLANT, LEEMING JA AND THE MAJORITY IN SOUTH PACIFIC AIR MOTIVE

75. The Appellant, at AS [22]-[39] and Leeming JA proceed without reference to the cardinal and primary purpose of the Conventions. Leeming JA at CA [306] relied upon
10 "a complementary purpose of the Convention" – the balancing of interests of passengers and carriers - and at CA [310] referred to decisions of final courts of appeal that referred to "*rights of passengers being exclusively those conferred by the Convention*" when those decisions more accurately refer to the <u>liability of carriers</u> being exclusively those imposed or regulated by those Conventions.

76. Each of the examples of claims that may be brought by non-passengers against carriers which the Appellant identifies at AS [33], Leeming JA identified at CA [321] to [327] and [344] to [346] and Hill and Sackville JJ identified in *South Pacific Air Motive* at 321F and 346 C do not give rise to conflict of laws questions to the avoidance of which the Conventions are primarily directed. Contrary to AS [35] and Leeming JA at CA
20 [324] to [326] and [350(3)], the fact that carriers are exposed to liabilities of that kind including those imposed by Part 12 of the *Civil Liability Act 2002* (NSW) does not prevent achievement of the Conventions' cardinal purpose and provides no reason to construe the Conventions or the Carriers' Liability Act otherwise than in accordance with that purpose.

77. The extrapolation from the contractual basis of the relationship at AS [53]-[61], by Leeming JA at CA [319] and by Hill and Sackville JJ in *South Pacific Air Motive* at 321C and 346E proceed on the erroneous basis that the Conventions and the Carriers' Liability Act require that any contract be <u>between the carrier and the passenger</u>. They do not. In this case, Mr Stephenson was not a party to any contract. In a great many
30 cases a passenger will not be a party to the contract of carriage which will be with an employer or tour operator.

78. The only relevance of a contract of carriage to the application of the Conventions and the Carriers' Liability Act, is to define the occasion of carriage as being relevantly

international, interstate or not.[60] It is the existence of such a contract which makes the relevant Convention applicable.[61] The analysis of the Appellant, Leeming JA and Hill and Sackville JJ in *South Pacific Air Motive* each proceed on the incorrect basis of a common lawyer's understanding of privity of contract. The Conventions are based upon the French *contrat*,[62] which in the case of a contract of carriage of a passenger imposes a strict liability on the carrier to complete the carriage safely, subject to the exception of *force majeure* and, possibly, fault of the passenger. That does not depend upon any contract being formed with the passenger,[63] or deny to relatives of a deceased passenger the opportunity to recover damages for breach of the carrier's obligations.[64]
10 The Conventions being based upon the *contrat* provide no support to the reasoning or conclusions of Leeming JA in this case or Hill and Sackville JJ in *South Pacific Air Motive*.

79. It follows that *South Pacific Air Motive*, in holding that s.36 within Part IV permitted the parents of the passengers to bring claims for nervous shock after all claims under Part IV had been extinguished was wrongly decided and should be overruled.

Part VII: Oral argument

80. Presentation of the Respondent's oral argument will take 3 hours.

Dated 3 August 2018

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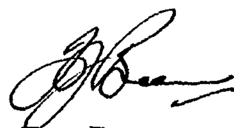

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[60] See *Grein*.
[61] *Flynn: The Interpretation of the Warsaw Convention and Wrongful Death Actions* National Law Journal, Volume 3, Issue 1 at page 79–80.
[62] Miller at pages 8–9, 12–14; *Block v Compagnie Air France* (1967) 386 F 2d 323 at 330 to 335 (5th Circuit).
[63] Miller at 54 to 57.
[64] Haanappel at 73.