

## **PARKES SHIRE COUNCIL v SOUTH WEST HELICOPTERS PTY LTD (S140/2018)**

Court appealed from: New South Wales Court of Appeal  
[2017] NSWCA 312

Date of judgment: 7 December 2017

Special leave granted: 18 May 2018

In 2006 Parkes Shire Council (“Parkes”) engaged South West Helicopters Pty Ltd (“South West”) to provide a helicopter and a pilot for an aerial noxious weed survey. The pilot, Mr Shane Thrupp, was an employee of South West, the helicopter itself was owned by Country Connection Airlines Pty Ltd (“Country Connection”), while two of Parkes’ employees, Mr Ian Stephenson and Mr Malcolm Buerckner were on board to conduct the survey. On 2 February 2006 the helicopter struck a power line owned by Essential Energy and crashed, killing all three men. The helicopter was destroyed.

The accident led to a number of claims and cross-claims. Mr Stephenson’s family commenced three sets of proceedings to which Essential Energy was also joined. Parkes commenced proceedings against South West, seeking to recover workers’ compensation payments made to the families of its two employees. South West then cross-claimed against Essential Energy, and both Essential Energy and South West cross-claimed against Parkes. South West and Country Connection also brought a proceeding against Essential Energy in damages for loss of the helicopter, while Essential Energy cross-claimed against Parkes.

The complex nature of the proceedings resulted in four judgments, with final orders being made by Justice Bellew on 12 August 2016. This then led to appeals by each of: South West / Country Connection, Essential Energy and Parkes. On 7 December 2017 the Court of Appeal (Basten, Leeming and Payne JJA) allowed the appeals of South West / Country Connection and Essential Energy, but dismissed that of Parkes.

Justices Basten and Payne held that the key provisions in s 35 of the *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) (“the Act”), governing a carrier’s liability in respect of the death of a passenger (such as Mr Stephenson), should, where possible, conform to the operation of the *Warsaw Convention of 1929* (“the Convention”). Their Honours held that s 28 of the Act, which renders the carrier liable “for damage sustained by reason of the death of the passenger”, is not limited to damage sustained by the deceased passenger, as s 35(3) provides that “the liability is enforceable for the benefit of such of the passenger’s family members as sustained damage by reason of his death”. “Damage” is also not limited to financial or economic loss.

Section 35(2) of the Act provides that liability of the carrier “is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger”. Justices Basten and Payne held that the reference to liability under any other law is not limited to tortious forms of liability, but includes such

liability. The Convention “imposes an event-based liability on the carrier”, which is intended to be exclusive of all other remedies available to a moving party seeking relief in connection with injury or death covered by the Convention.

The majority held that to treat the operation of s 35 (relating to death) and s 36 (relating to personal injury) of the Act as having analogous operations, is to disregard both the subject matter of the claim and the differential language of the Convention and the statute.

Justices Basten and Payne found that the salient event here was the death of an aircraft passenger in the course of carriage by air. In the context of the Convention and the purposes of the Act, the claims of the family in respect of nervous shock were claims “in respect of” the death of Mr Stephenson. It followed therefore that they were excluded by s 35(2) of the Act and they should have been dismissed.

The grounds of appeal are:

- The Court of Appeal erred in its construction of s 35 of the Act.
- The Court should have held that claims for psychiatric injury against carriers by non-passengers following the death of a passenger are not regulated by s 35 of the Act.