HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

AGTRACK (NT) PTY LIMITED (TRADING AS SPRING AIR) APPELLANT

AND

ANN CHRISTINE HATFIELD RESPONDENT

Agtrack (NT) Pty Limited v Hatfield [2005] HCA 38
10 August 2005
M192/2004

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

R F Margo SC with R M Peters and M J Leeming for the appellant (instructed by Norton White)

A G Uren QC with P F O'Dwyer SC for the respondent (instructed by Slater & Gordon)

Intervenors:

H C Burmester QC with B F Quinn intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor's Office)

M G Sexton SC, Solicitor-General for the State of New South Wales with J G Renwick intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with A Rao intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office South Australia)

P M Tate SC, Solicitor-General for the State of Victoria with S G E McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Agtrack (NT) Pty Limited v Hatfield

Aviation – Carriage by air – Liability of carrier – Liability under Pt IV of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("Carriers Act") for damage sustained by reason of the death of a passenger resulting from an accident which took place on board an aircraft in the course of commercial transport operations – Liability enforceable for the benefit of such family members of deceased passenger as sustained damage by reason of the death – Passenger killed in aircraft accident – Action brought by family member – Whether action in exercise of right to damages brought within two years of the date on which the carriage stopped – Whether right to damages extinguished.

Aviation – Carriage by air – Liability of carrier – Family member's statutory right to damages – Extinguishment – Whether extinguishment of right to damages by effluxion of time involves determination of a condition which is of the essence of the right to damages or merely bars enforcement of the right.

Pleading – Statement of claim – Whether sufficient facts pleaded to raise a claim under Carriers Act, Pt IV – Whether explicit invocation of Carriers Act, Pt IV is necessary to raise such a claim – Relevance of rules of court of a State court where claim arises under federal law.

Pleading – Amendment – Amendment to pleadings to place beyond doubt reliance upon Carriers Act – Whether such amendment permissible after date on which right to damages would be extinguished – Relevance of State limitation of actions legislation.

Private international law – Choice of law – Cause of action accrues in Northern Territory – Action brought in Victoria – Cause of action arises under federal law – Whether common law choice of law rules applicable.

Constitutional law (Cth) – Federal judicial power – Federal jurisdiction – Jurisdiction invested in State courts in matters arising under federal law – Whether federal jurisdiction engaged – Whether law of Victoria governs the action by reason of *Judiciary Act* 1903 (Cth) ("Judiciary Act"), ss 79, 80 – Whether federal claim properly pleaded according to rules of court of a State court.

Constitutional law (Cth) – Inconsistency of laws – State law adopting *Lord Campbell's Act* invalid as inconsistent with Carriers Act, s 35(2) – Consequences of inconsistency – Relationship of s 109 of the Constitution with Judiciary Act, s 79.

Words and phrases – "is extinguished", "action … brought".

Civil Aviation (Carriers' Liability) Act 1959 (Cth), Pt IV.
Judiciary Act 1903 (Cth), ss 39, 79, 80.
Constitution, s 76(ii).

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND HEYDON JJ. On 14 August 1997, a Cessna aircraft carrying Mr S J Hatfield crashed and he was killed. The respondent (Mrs A C Hatfield) is his widow. The Cessna aircraft was operated by the appellant which carried on an aircraft charter business under the name "Spring Air". The effect of s 27 of the *Civil Aviation Act* 1988 (Cth) ("the CAA") was that the Cessna aircraft could not operate for commercial purposes in the air space over the territory of Australia[1], except as authorised by an "Air Operator's Certificate" ("AOC") issued under the CAA. Spring Air held an AOC authorising charter operations by the Cessna.

2 By writ and attached Statement of Claim filed on 22 January 1999 in the Supreme Court of Victoria, Mrs Hatfield claimed for her own benefit damages against Spring Air. By its Defence dated 24 March 1999, Spring Air admitted some allegations but denied that the claim against it was maintainable. These pleading steps were taken within two years of 14 August 1997. The significance of that anniversary will appear later in these reasons.

The common law and *Lord Campbell's Act*

3 The common law of Australia gave to Mrs Hatfield no action for damages against Spring Air for loss she suffered by reason of her husband's death[2]. That death took place in the geographical area of the Northern Territory where the plane crashed, but the action was brought in the Supreme Court of Victoria. Both the statute law of the Northern Territory and of Victoria made provision of the same nature as *Lord Campbell's Act* for recovery for a widow of a deceased husband[3]. However, federal law also makes provision of this nature in the limited circumstances to which Pt IV of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Carriers' Act") applies.

4 Where Pt IV of the Carriers' Act imposes a liability in respect of the death of a passenger, the liability is expressed by s 35(2) thereof as being in substitution for any civil liability of the carrier under any law in respect of that death. The result in the present case was that any operation of the law of the

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1 By application of the definition of "Australian territory" in s 3(1) of the CAA and reg 206 of the Civil Aviation Regulations 1988.

2 *Woolworths Ltd v Crotty* (1942) 66 CLR 603.

3 *Wrongs Act* 1958 (Vic), Pt III; *Compensation (Fatal Injuries) Act* 1974 (NT).

Northern Territory was displaced[4] and the law of Victoria was, to this extent, rendered invalid by the operation of s 109 of the Constitution.

5 Mrs Hatfield relies upon the application of the Carriers' Act to her claim for damages. She accepts the displacement by the Carriers' Act of any State or Territory equivalent of *Lord Campbell's Act* which otherwise may have applied. It is unnecessary here to consider which statute would have supplied the lex causae in such action instituted in the Supreme Court of Victoria and not involving the exercise of federal jurisdiction[5].

The Carriers' Act and choice of law rules

6 Some further reference is necessary to the connection between Mrs Hatfield's assertion of her right to recover damages under Pt IV of the Carriers' Act and the facts and circumstances located within the geographical area of the Northern Territory. The nature and consequences in law of that geographical connection should not be misunderstood. Mrs Hatfield does not bring an action in contract or tort. An action in tort or contract may, of course, attract federal jurisdiction as, for example, an action against the Commonwealth to which s 75(iii) of the Constitution applies, or an action in the diversity jurisdiction to which s 75(iv) applies. In contrast, Mrs Hatfield's rights flow purely and solely from Pt IV of the Carriers' Act.

7 The Carriers' Act is expressed by s 6 as extending to "every Territory", a term which includes every Territory referred to in s 122 of the Constitution[6]. This emphasises the importance of the principle expressed in *John Pfeiffer Pty Ltd v Rogerson*[7] that the Commonwealth of Australia is "a single law area with respect to matters within federal jurisdiction".

8 Several further propositions stated in the joint judgment in *John Pfeiffer* are in point. First, federal jurisdiction is national in nature so that no question

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4 *Northern Territory v GPAO* (1999) 196 CLR 553.

5 cf *Koop v Bebb* (1951) 84 CLR 629; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 521-522 [27].

6 *Acts Interpretation Act* 1901 (Cth), s 17.

7 (2000) 203 CLR 503 at 518 [18] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

arises in matters of federal jurisdiction which involves any choice of law between laws of competing jurisdictions; rather, what is required is identification of the applicable law in accordance with ss 79 and 80 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act")[8].

9 Secondly, by this means, there are "picked up" any applicable common law choice of law rules as modified by the statute law of the State or Territory in question[9]. There are no such common law choice of law rules applicable to the present action[10]. It is not, for example, an action in contract or tort. To the contrary of what appeared to be suggested in some of the submissions, there is no adoption here, by application of choice of law rules pursuant to the Judiciary Act, of the statute law of the Northern Territory as the lex loci delicti.

10 Thirdly, the effect of the foregoing is that "if an action is brought in a State court exercising federal jurisdiction, the law of that State will govern the action no matter where the events in question occurred"[11].

11 Fourthly, that last step is subject to the overriding requirements of the Judiciary Act itself, in particular that found in the phrases in s 79 "except as otherwise provided by the Constitution or the laws of the Commonwealth" and "in all cases to which they are applicable". It will be necessary to return to the significance of those qualifications later in these reasons.

The two issues

12 The application of Pt IV of the Carriers' Act to the present facts and circumstances brings several difficulties for Mrs Hatfield's claim. Neither the writ nor the Statement of Claim in terms invoked rights under the Carriers' Act. Nor, indeed, was there any reference to any of the State or Territory equivalents of *Lord Campbell's Act*. Spring Air submits that the process nevertheless was

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8 (2000) 203 CLR 503 at 530 [53].

9 (2000) 203 CLR 503 at 531 [55]-[56]. See also *Blunden v Commonwealth* (2003) 78 ALJR 236 at 240 [18]; 203 ALR 189 at 194.

10 cf *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 434-436; *Blunden v Commonwealth* (2003) 78 ALJR 236 at 240 [18], 241 [23], 244 [40]; 203 ALR 189 at 194, 195, 199.

11 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 531 [57].

expressed in the form to be expected of a *Lord Campbell's Act* claim and not otherwise. From this, two further issues arise in the appeal.

13 First, any right to damages otherwise conferred upon Mrs Hatfield by the Carriers' Act is treated by that statute as having been "extinguished" if "an action" had not been "brought" within two years of 14 August 1997. That is stipulated by s 34. The text of that provision is set out later in these reasons. Mrs Hatfield maintains that she did bring an action within that period by the Supreme Court proceeding. Spring Air denies this.

14 The second issue arises as follows. If it transpires that Mrs Hatfield had not brought an action before 14 August 1999, was the Victorian Supreme Court, in exercise of its powers and procedures "picked up" by s 79 of the Judiciary Act, authorised to permit thereafter amendments to the pleadings to place beyond doubt Mrs Hatfield's reliance upon the Carriers' Act? Was this course open notwithstanding the use in s 34 of the Carriers' Act of the term "extinguished"? Spring Air contends the answer is "no".

The Supreme Court proceedings

15 A judge of the Supreme Court (Ashley J) in effect answered the second issue "yes", and thus in favour of Mrs Hatfield[12]. On 6 June 2001, his Honour granted leave to Mrs Hatfield to file an amended Statement of Claim plainly grounding her action in the Carriers' Act. The Court of Appeal (Ormiston and Chernov JJA, O'Bryan AJA) dismissed an appeal[13]. This outcome in the Court of Appeal involved an affirmation of the favourable answer to Mrs Hatfield on the second issue. As Chernov JA put it[14], the grant of leave to amend was within the powers of the Supreme Court and appropriately given by the Court "[n]otwithstanding that [s 34 of the Carriers' Act] effectively extinguished [Mrs Hatfield's] cause of action before she had applied for leave to amend".

16 The Court of Appeal should have answered "no" to the second issue. The term "extinguished" is used in s 34 to mean just that, and the reasons for so

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12 *Hatfield v Agtrack (NT) Pty Ltd* (2001) 183 ALR 674.

13 *Agtrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63.

14 (2003) 7 VR 63 at 105.

concluding are given later in this judgment. However, that does not mean that the appeal to this Court by Spring Air must succeed.

17 By her Notice of Contention filed pursuant to leave granted during the hearing of the appeal, Mrs Hatfield submits that the first issue should have been decided in her favour. She contends that sufficient facts had been pleaded to raise a claim by her under Pt IV of the Carriers' Act, so that she had brought an action within two years after 14 August 1997 and there was no extinguishment by operation of s 34. These submissions by Mrs Hatfield should be accepted, with the result that the appeal to this Court should be dismissed.

18 In order to explain how these conclusions are reached, it is necessary first to say something more respecting the Carriers' Act.

The requirements of Pt IV of the Carriers' Act

19 Part IV of the Carriers' Act (ss 26-41) does not apply to the carriage of a passenger to which the Warsaw Convention, the Hague Protocol or the Guadalajara Convention applies (s 27(1)). It has not been suggested that any of these Conventions applied to the carriage of Mr Hatfield by Spring Air.

20 Part IV does not apply to the carriage of Mr Hatfield unless Spring Air was the holder of an airline licence or a charter licence. The term "charter licence" is defined (s 26(1)) as including an AOC which is in force under the CAA and authorises charter operations. This was admitted on the pleadings.

21 The next relevant requirements in s 27(1) are that the carriage of the passenger be "under a contract for the carriage of the passenger" and be "in the course of commercial transport operations". The term "contract" includes "an arrangement made without consideration" (s 26(1)). The phrase "commercial transport operations" means "operations in which an aircraft is used, for hire or reward, for the carriage of passengers or cargo" (s 26(1)). A further relevant requirement of s 27(1) is that Mr Hatfield was carried by Spring Air under a contract for his carriage between a Territory and a place in Australia outside that Territory, or between a place in a Territory and another place in that Territory. In particulars given with her Statement of Claim, Mrs Hatfield alleged an agreement to carry her husband and two others on "a tourist flight through parts of the Northern Territory and the Kimberleys", which are situated in Western Australia.

22 Section 28 creates a "strict" liability as follows:

> "Subject to this Part, where this Part applies to the carriage of a passenger, the carrier is liable for damage sustained by reason of the death of the passenger or any personal injury suffered by the passenger resulting from an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Section 35 then makes particular provision respecting the liability imposed by Pt IV on a carrier in respect of the death of a passenger. Subject to immaterial qualifications found in s 37, s 35(2) states that this liability under Pt IV:

> "is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger".

23 The statutory liability is enforceable for the benefit of such members of the family of the deceased passenger (including a widow) "as sustained damage by reason of his death" (s 35(3), (5)). The action may be brought by the personal representative of the passenger or by a family member, but only one action is to be brought (s 35(6)). Any provision of an agreement tending to relieve the carrier of liability or to fix a lower limit than that fixed by Pt IV is null and void (s 32).

A matter arising under the Carriers' Act

24 These provisions of the Carriers' Act are an example of a federal law which creates new rights and duties. A controversy respecting the existence and enforcement of these rights and duties "accordingly supplies an appropriate subject or 'matter' upon which 'judicial power' or 'jurisdiction' may operate, whether the jurisdiction is given in the same breath or quite independently". The words are those of Dixon J in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[15].

25 Here, jurisdiction is conferred independently, by laws made in exercise of the power conferred upon the Parliament by s 77(i) and s 77(iii), with respect to "matters" which "arise under" the Carriers' Act within the meaning of s 76(ii) of the Constitution. One such law is s 39B of the Judiciary Act. This states that the original jurisdiction of the Federal Court includes jurisdiction in any matter arising under any laws made by the Parliament other than criminal matters.

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15 (1945) 70 CLR 141 at 166.

Another is the general investment of State courts by s 39(2) of the Judiciary Act with jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it. It is the investment of federal jurisdiction upon the Supreme Court of Victoria by s 39(2) which Mrs Hatfield submits was engaged here.

26 The question whether a State court has exercised federal jurisdiction with which it is invested by a law of the Parliament supported by s 77(iii) of the Constitution may arise in various ways. In some cases, including *Moorgate Tobacco Co Ltd v Philip Morris Ltd*[16] and *LNC Industries Ltd v BMW (Australia) Ltd*[17], the answer to the question determined the competency of a pending appeal to the Privy Council. In other cases, the answer determines whether an appeal lies directly to this Court from an inferior court of a State because, within the meaning of s 73(ii) of the Constitution, this was a "court exercising federal jurisdiction"[18]. In *Hume v Palmer*[19], Isaacs J observed of the decision of a magistrate convicting the appellant in a summary prosecution, despite an objection that the State law in question was invalid by operation of s 109 of the Constitution:

> "The Police Magistrate, consequently, whether he intended or not, or whether he knew it or not, was exercising Federal jurisdiction within the meaning of s 73 of the Constitution."

27 The obligation imposed by s 78B of the Judiciary Act upon courts not to proceed in a pending cause, unless satisfied of compliance with the notice provisions of s 78B, turns upon the question whether that cause "involves a matter arising under the Constitution or involving its interpretation". A criterion similarly expressed governs the removal procedure in s 40(1). The removal procedure in s 40(2)(b) requires there to be "pending in a court of a State a cause involving the exercise of federal jurisdiction by that court".

28 In the present litigation, the question of the exercise of federal jurisdiction arises in the context of a time stipulation in Pt IV of the Carriers' Act.

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16 (1980) 145 CLR 457.

17 (1983) 151 CLR 575.

18 For example, *H V McKay Pty Ltd v Hunt* (1926) 38 CLR 308 at 313.

19 (1926) 38 CLR 441 at 451.

29 It is well settled that a "matter" means more than a legal proceeding[20] and that "an important aspect of federal judicial power is that, by its exercise, a controversy between parties about some immediate right, duty or liability is quelled"[21]. Further, federal jurisdiction may be attracted at any stage of a legal proceeding, as Barwick CJ emphasised in *Felton v Mulligan*[22]. Indeed, as early as 1907, this Court had remarked that federal jurisdiction may be raised for the first time in a defence[23]. In *Re Wakim; Ex parte McNally*[24], Gummow and Hayne JJ said:

> "The central task is to identify the justiciable controversy. In civil proceedings that will ordinarily require close attention to the pleadings (if any) and to the factual basis of each claim."

30 Not all proceedings will be civil in nature. The appellants in *Pioneer Express Pty Ltd v Hotchkiss*[25] had been convicted in a Court of Petty Sessions, on information laid under State law. *Hume v Palmer*[26] was an earlier example. An appeal lay in these cases under s 73(ii) because the inferior court of the State nevertheless was a "court exercising federal jurisdiction". In *Pioneer Express*, Dixon CJ explained[27]:

> "the jurisdiction became federal because some of the defences that failed were founded upon immunities which, according to the defendant's claim, arose under the Constitution of the Commonwealth".

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20 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

21 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 [242].

22 (1971) 124 CLR 367 at 373.

23 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR (Pt 2) 1087 at 1136.

24 (1999) 198 CLR 511 at 585 [139].

25 (1958) 101 CLR 536.

26 (1926) 38 CLR 441.

27 (1958) 101 CLR 536 at 543-544.

Many of the "transport cases" reached this Court by a similar path.

31 This illustrates the point that s 39(2) of the Judiciary Act invests a range of State courts with federal jurisdiction. Some of these are not courts of strict pleading; others are not courts of pleading at all and proceedings may be instituted with brief factual assertions. It should be added that, even under the traditional common law procedures, the initiating writ might be uncommunicative of the legal and factual basis of the claim for damages made in the writ.

32 Whether federal jurisdiction with respect to one or more of the matters listed in ss 75 and 76 of the Constitution has been engaged in a legal proceeding is a question of objective assessment. If a party on either side of the record relies upon a right, immunity or defence derived from a federal law, there is a matter arising under s 76(ii) of the Constitution. It is not a question of establishing an intention to engage federal jurisdiction or an awareness that this has occurred. Immediate ascertainment of the factual basis of a justiciable controversy and of the attraction of federal jurisdiction in a proceeding will not always be possible by regard simply to allegations pleaded. If the attraction of federal jurisdiction itself is disputed, it may require evidence of the factual basis of the controversy to permit an answer to that question. It is unnecessary to pursue that aspect further in this case. Here, there was a Statement of Claim and a Defence which had been filed before the deadline of 14 August 1999. Regard may be had to both in deciding whether by that date an action under Pt IV of the Carriers' Act had been brought.

The judgment of Ormiston JA

33 In the Court of Appeal, Ormiston JA gave the leading judgment. His Honour would have favoured a holding in favour of Mrs Hatfield on the first issue were it not for the significance which he held should be given to the recent decision of a court of co-ordinate jurisdiction, namely that of the New South Wales Court of Appeal in *Air Link Pty Ltd v Paterson*[28] ("*Air Link [No 1]*"). However, in a decision to be announced at the same time as that in the present appeal, special leave is granted to appeal from *Air Link [No 1]* and the appeal is allowed. The result is to reinforce the inclination of Ormiston JA in favour of Mrs Hatfield's submissions on the first issue.

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28 [2002] NSWCA 85.

34 Ormiston JA referred to the treatment in the pleadings of the AOC being a charter licence. Of a complaint that the pleadings did not squarely allege the carriage of Mr Hatfield as a passenger by Spring Air "in the course of commercial transport operations" as required by s 27(1) of the Carriers' Act, his Honour said[29]:

> "But the definition requires only that the 'operations' are those in which 'an aircraft is used, for hire or reward, for the carriage of passengers or cargo'. That is simply satisfied by the allegation that the company was carrying on the business of 'aircraft charter'. It is not the specific flight that had to be for reward;[30] rather it was 'the operations' as a whole which had to be so characterised. An allegation that [Spring Air] carried on a charter business, as appeared in par 1 [of the Statement of Claim], was sufficient, so long as the particular flight was a 'carriage' [which was] 'in the course' of those operations and that was satisfied by the allegation in par 2 that [Mr Hatfield] 'had agreed' with [Spring Air] that he and other passengers be carried on a sight-seeing tour."

35 Ormiston JA went on to conclude that the path of the flight was sufficiently defined by reference to the statement in the particulars that it was to be "through parts of the Northern Territory and the Kimberleys". His Honour added[31]:

> "Admittedly the starting and finishing points of the flight are not stated and this would have been important if the flight had commenced within one of the States, for it may then have been an intra-state flight. Here, it would have been clear enough that the flight began within the Northern Territory, to which Pt IV applies exclusively, and was not the subject of any State Acts imposing liability for intra-state flights. ... Moreover, the particulars of negligence to par 4 also alleged inferentially that one of the landing places during the flight was Timber Creek in the Northern Territory and that, by reason of the provisions of sub-s (3) of s 27, meant that Timber Creek was one of the finishing and starting points of the

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29 (2003) 7 VR 63 at 73.

30 The 'contract for the carriage of the passenger' required by s 27(1) includes, according to the definition of 'contract' in s 26(1) 'an arrangement made without consideration'.

31 (2003) 7 VR 63 at 73-74 (footnote omitted).

flight, even if one were to assume, as I would not, that the flight commenced outside the Territory."[32]

36 Ormiston JA also emphasised that the allegations in the Statement of Claim that the aircraft carrying Mr Hatfield crashed and that he died the same day indicated that the crash caused the death and that it was to be inferred that the allegation was that the death of Mr Hatfield resulted "from an accident which took place on board the aircraft" within the requirement of s 28.

37 Finally, his Honour noted that, whilst the Statement of Claim described Mrs Hatfield as the "widow" of the passenger and expressed her loss in conventional terms applicable to claims under *Lord Campbell's Act*, there could be no doubt that she was a "family" member alleging that she had suffered damage within the meaning of s 35 of the Carriers' Act.

The significance of State pleading rules

38 There remains the submission, much pressed in oral argument in this Court, that it was essential for the attraction of federal jurisdiction that there appear on the face of the pleadings an invocation of Pt IV of the Carriers' Act. However, counsel for the Attorney-General of the Commonwealth, who intervened, correctly emphasised that it would be an error to focus upon such rules as there were in a particular State jurisdiction respecting pleading requirements, if the court be a court of pleading. It would be a further error to reason from those requirements to a conclusion as to whether an action had been brought within the meaning of s 34 of the Carriers' Act to enforce the right of a person to damages under Pt IV thereof.

39 Rule 13.02(1)(b) of Ch I of the Rules of the Victorian Supreme Court applies to a claim which "arises by or under any Act" and requires the "pleading"

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32 Section 27(3) of the Carriers' Act states:

> "For the purposes of this section, where, under a contract of carriage, the carriage is to begin and end in the one State or Territory (whether at the one place or not) but is to include a landing or landings at a place or places outside that State or Territory, the carriage shall be deemed to be carriage between the place where the carriage begins and that landing place, or such one of those landing places as is most distant from the place where the carriage begins, as the case may be."

to identify the specific provision relied upon. When "picked up" by s 79 of the Judiciary Act, it may be taken that "Act" is to be understood as including a federal statute. However, there is no requirement in Pt IV that a plaintiff expressly invoke the Carriers' Act in any legal process.

40 The Attorney-General correctly submitted that a separate and subsequent question may arise as to whether an action brought under Pt IV has been properly pleaded in accordance with any rules of pleading picked up by s 79 of the Judiciary Act. For example, if the relevant rules of court required that any particular statutory provision be referred to, it might be necessary for a plaintiff to amend. However, such amendments would not be disallowed on the basis that there had been a failure to comply with Pt IV of the Carriers' Act. As it happens, in the present case Ormiston JA had said[33]:

> "[I]f all the facts were otherwise properly contained in the statement of claim, there would ordinarily be little reason why an amendment should not be permitted to satisfy the rule. It would thus merely characterise a liability which the facts would otherwise establish."

Conclusion respecting the first issue

41 It is appropriate now to return to s 34 of the Carriers' Act. This states:

> "The right of a person to damages under this Part is extinguished if an action is not brought by him or for his benefit within two years after the date of arrival of the aircraft at the destination, or, where the aircraft did not arrive at the destination;
>
> (a) the date on which the aircraft ought to have arrived at the destination; or
>
> (b) the date on which the carriage stopped;
>
> whichever is the later."

The first question posed by s 34 for the present case is whether Mrs Hatfield had brought an action by herself or for her benefit within two years after "the date on which the carriage stopped" by reason of the crash of the aircraft on 14 August

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33 (2003) 7 VR 63 at 75.

1997. That, it would appear, was also "the date on which the aircraft ought to have arrived at the destination".

42 The analysis by Ormiston JA of the pleadings as they stood by 14 August 1999 demonstrates that, within the two year period, Mrs Hatfield had brought an action in exercise of her right to damages under Pt IV. She was the widow of a passenger who had died as the result of an aircraft accident. She claimed to have suffered damage by reason of the passenger's death and claimed damages from the carrier. The facts alleged in the pleadings showed that Pt IV applied.

43 Contrary to the submissions by Spring Air, it is unnecessary to show that within this period Mrs Hatfield had it in her mind, or her lawyers had it in their minds, that they were proceeding under Pt IV. Nor was it a requirement for compliance with s 34 that the Statement of Claim aver reliance upon Pt IV. Allegations that went beyond what was required to comply with s 34 were surplusage. The surplusage was liable to removal under procedural provisions picked up by s 79 of the Judiciary Act, but that did not deny that s 34 had been satisfied.

44 That conclusion is sufficient to produce an answer in Mrs Hatfield's favour on the first issue. However, something more should be said of a further submission she made respecting the construction of s 34 of the Carriers' Act. It was contended that it was in any event sufficient that Mrs Hatfield had brought "an action" within time, albeit not one apt to exercise the right to damages under Pt IV. This construction involves disjoining the words "an action" in s 34 both from what precedes them and from what follows them. The phrase "if an action is not brought by him or for his benefit" is to be read as a whole. The concluding words respecting "benefit" clearly refer to the provisions in s 35 for liability in respect of death. In particular, s 35(3) states:

> "Subject to the next succeeding subsection, the liability is enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death."

Likewise, the "action" spoken of in s 34 is one in exercise of the right to damages under Pt IV which is at peril of extinguishment. The submissions by Mrs Hatfield on this particular construction point should be rejected. Her case succeeds without the need to make them good.

Conclusion respecting the second issue

45 It remains further to consider the construction of the opening words of s 34 of the Carriers' Act "[t]he right of a person to damages under this Part is extinguished". Section 34 is to be construed having regard to the position of Pt IV in the structure of the legislation as a whole. In that regard, reference has already been made to the exclusion of Pt IV from carriage to which applies the Warsaw Convention, the Hague Protocol or the Guadalajara Convention. That carriage is dealt with respectively in Pt II (ss 10-19) (the Warsaw Convention and the Hague Protocol), Pt III (ss 20-25) (the Warsaw Convention without the Hague Protocol) and Pt IIIA (ss 25A-25C) (the Guadalajara Convention).

46 Articles 28 and 29 of the Warsaw Convention (which appears as Sched 1 to the Carriers' Act) state:

"*Article 28*

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

2. Questions of procedure shall be governed by the law of the Court seised of the case.

Article 29

1. The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating the period of limitation shall be determined by the law of the Court seised of the case."

47 Of the relationship between the reference in Art 28 to questions of procedure and Art 29, Phillips LJ observed in *Milor Srl v British Airways Plc*[34]:

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34 [1996] QB 702 at 707.

> "In my judgment, that general provision [Art 28] cannot give validity to a rule of procedure of the court seised of the case that is in conflict with an express provision of the Convention. By way of example, if the procedural law of the chosen forum imposed a 12-month limitation period, it does not seem to me that this could displace the two-year period of limitation laid down by article 29 of the Convention."

48 Section 8(2) of the Carriers' Act states:

> "If there is any inconsistency between the text of a Convention as set out in a Schedule and the text that would result if the authentic French texts of the instruments making up the Convention were read and interpreted together as one single instrument, the latter text prevails."

Article 36 of the Warsaw Convention reads:

> "The Convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties."

Australia was one of those High Contracting Parties, as was recited in the preamble to the *Carriage by Air Act* 1935 (Cth) ("the 1935 Act").

49 In the work, *Warsaw Convention*[35], Dettling-Ott writes of Art 29:

> "The original French text of the Convention names the limit of Article 29 as '*délai ... sous peine de déchéance*'. '*Déchéance*' should be translated as 'extinction'. The German translation uses the word '*Ausschlussfrist*', the English translation [of] the term 'the right shall be extinguished' is used. The wording is clear ... A plaintiff will lose the rights to damages against the carrier if the time-limit of Article 29 expires.
>
> This notion is supported by the fact that French law uses the term '*déchéance*' for a condition precedent (as a typical example Article 340-4 of the French Code Civil with a similar wording).

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35 Giemulla and Schmid (eds), *Warsaw Convention*, (2003), Art 29, pars 15-16.

> In most countries the courts held that Article 29 contains [a] condition precedent. Commentators have also generally argued that Article 29 contains a condition precedent." (footnotes omitted)

In Shawcross and Beaumont, *Air Law*[36], it is said respecting Art 29:

> "If the right of action is 'extinguished', it would seem that it is completely destroyed and not merely rendered unenforceable by action."

50 In *Kahn v Trans World Airlines Inc*[37], the Appellate Division of the Supreme Court of New York gave detailed consideration to the travaux préparatoires of the Warsaw Convention. The Court concluded from these materials[38]:

> "Based upon the foregoing, it is abundantly clear that the delegates to the Warsaw Convention expressly desired to remove those actions governed by the Convention from the uncertainty which would attach were they to be subjected to the various tolling provisions of the laws of the member states, and that the two-year time limitation specified in article 29 was intended to be absolute – barring any action which had not been commenced within the two-year period. Moreover, it is equally clear from the delegates' discussion that the only matter to be referred to the forum court by paragraph 2 of the present article 29 was the determination of whether the plaintiff had taken the necessary measures within the two-year period to invoke that particular court's jurisdiction over the action."

The Court added[39]:

> "[I]t is readily apparent that the time limitation incorporated in article 29 was intended to be in the nature of a condition precedent to suit, and that it was never intended to be extended or tolled by infancy or other incapacity. In addition, such an intent on the part of the draftsmen is fully consistent with one of the Convention's overall purposes – that of establishing 'a

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36 4th ed (2005), vol 1, par VII[443].

37 443 NYS 2d 79 (1981).

38 443 NYS 2d 79 at 87 (1981).

39 443 NYS 2d 79 at 87 (1981).

> uniform body of world-wide liability rules to govern international aviation'[40]."

The South Australian Full Court reached a conclusion to similar effect in *Timeny v British Airways plc*[41].

51 The result is that there is a strong body of authority construing Art 29 of the Warsaw Convention as imposing a condition which is of the essence of the right to damages rather than providing for no more than a bar to the enforcement of an existing right. Such a distinction is well understood in Australian law and thus is readily accommodated in the drafting of s 34 of the Carriers' Act[42].

52 Section 4 of the Carriers' Act, as enacted, repealed the 1935 Act, which had given effect in Australia to the Warsaw Convention. The enactment of the Carriers' Act was precipitated by the adoption by Australia of the Hague Protocol to amend the Warsaw Convention. Since that time, provision also has been made (now in Pt IIIA) respecting the Guadalajara Convention. In the Second Reading Speech in the House of Representatives upon the Bill for what became the Carriers' Act, the Minister for Defence said[43]:

> "Part IV of the bill will apply the international rules, with certain modifications to domestic airline operators except when they are engaged in purely intra-state carriage, which is, of course, a matter for the States."

The reservation respecting purely intrastate carriage was expressed before the litigation in *Airlines of NSW Pty Ltd v New South Wales*[44] and *Airlines of NSW*

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40 *Reed v Wiser* 555 F 2d 1079 at 1090 (1977).

41 (1991) 56 SASR 287.

42 See *The Crown v McNeil* (1922) 31 CLR 76 at 100-101; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488-489; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 276-277; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 130-131, 156; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 148-149 [32].

43 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 905.

44 (1964) 113 CLR 1.

Pty Ltd v New South Wales [No 2][45]. It will be recalled that the litigation produced a situation identified by Menzies J in *Airlines [No 2]*[46]:

> "It was urged that a decision of this Court leaving intra-State air transport services to the veto of both Commonwealth and State would create a situation of stalemate or deadlock. This argument is irrelevant. A constitutional division of legislative power which is not exclusive may sometimes mean that those who are subject to both Commonwealth and State control have two sets of restrictions to surmount before they can do that which they want to do. ... The answer to stalemate or deadlock in such circumstances is co-operation."

53 In the Second Reading Speech upon the Bill for the Carriers' Act, the Minister went on[47]:

> "The most important objective in applying the principles of the convention to domestic aviation is to deprive the domestic carriers of their present right to contract out of all liability for damage howsoever caused, and to make them liable for proven damages up to [what was then] £7,500. Clause 32 of the bill provides that any contract attempting to fix a lower limit is null and void."

54 Given the subject, scope and purpose of the statute as a whole, it is readily apparent that s 34 should be given a construction harmonious with that which applies to the international carriage dealt with under the Conventions, in particular with reference to Art 29 of the Warsaw Convention.

The operation of s 79 of the Judiciary Act

55 With respect to the proceeding instituted by Mrs Hatfield in the Supreme Court of Victoria, which, as has been indicated, invoked federal jurisdiction, s 79 of the Judiciary Act applied. This states:

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45 (1965) 113 CLR 54.

46 (1965) 113 CLR 54 at 144.

47 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 905.

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

56 Section 34(1) of the *Limitation of Actions Act* 1958 (Vic) ("the Victorian Limitation Act")[48] states:

> "If a court would, but for the expiry of any relevant period of limitation after the day a proceeding in the court has commenced, allow a party to amend a document in the proceeding, the court must allow the amendment to be made if it is satisfied that no other party to the proceeding would by reason of the amendment be prejudiced in the conduct of that party's claim or defence in a way that could not be met by an adjournment, an award of costs or otherwise."

57 The sidenote to s 34 reads "Abrogation of rule in *Weldon v Neal* (1887) 19 QBD 394". Much attention was given in the submissions to the Court to what *Weldon v Neal* decided, but, in the event, this is but a distraction from the questions to be decided on this appeal.

58 It is accepted that, of its own force, s 34 of the Victorian Limitation Act could have no application to the litigation of a matter arising under a law of the Commonwealth[49]. The question is whether s 34 of the State Act is apt to be given binding effect by s 79 of the Judiciary Act.

59 The terms of s 79 indicate that this can only be so if the case in question is one in which the State law is applicable[50]. Section 34 of the Carriers' Act, as indicated earlier in these reasons, is an integral part of the federal statutory right to damages. Section 34 is not a provision which adds a time limitation in respect of a right defined independently of s 34. Section 28 which creates the statutory right expressly does so "[s]ubject to this Part" and thus to s 34. It follows that, if an action was not brought by Mrs Hatfield or for her benefit within the two year

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48 Reference also was made by the Court of Appeal to the similarly expressed Supreme Court Rules, Ch 1, r 36.01(6).

49 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [21].

50 See *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134-135 [23]-[24].

period required by s 34, what ensued was not the expiry of a relevant period of limitation, but the removal of a prerequisite for the existence of the right sought to be litigated. In those circumstances, s 79 did not operate to "pick up" the Victorian provision.

60 The same conclusion may be reached by another route. Were s 34 of the State statute to be picked up by s 79, it would provide otherwise than as required by s 34 of the Carriers' Act. It would have "derogated from" the extinction wrought by s 34 of the federal statute[51].

Section 109 of the Constitution

61 Something should be added respecting the operation of s 109 of the Constitution in the circumstances of Pt IV of the Carriers' Act. Earlier in these reasons it has been noted that s 35(2) of the Carriers' Act substitutes the liability under Pt IV in respect of the death of a passenger for any civil liability of a carrier "under any other law". To that extent, the State laws adopting *Lord Campbell's Act* are rendered invalid. A plaintiff who sued, say, in the diversity jurisdiction in a State court and sought to rely upon *Lord Campbell's Act* could not do so. By reason of s 35(2) and the operation of s 109 of the Constitution, that State statute would have ceased to be a law of a State within the meaning of s 79 of the Judiciary Act; there would be no subject-matter to be picked up by the operation of s 79.

62 This operation of s 109 is anterior to any commencement or prosecution of a proceeding in a court. Section 79 begins to operate "only where there is already a court 'exercising federal jurisdiction', 'exercising' being used in the present continuous tense"[52].

63 The relationship between s 109 of the Constitution and s 79 of the Judiciary Act, which is sequential rather than concurrent, was further explained in *Northern Territory v GPAO*[53]. There the expression "threshold issue" was used.

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51 *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287 at 296 [22].

52 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [23].

53 (1999) 196 CLR 553 at 576 [38], 586 [76].

Conclusions

64 The appellant, Spring Air, succeeds on the second issue but it is enough for the respondent, Mrs Hatfield, that she succeeds and Spring Air fails on the first issue to produce an outcome in her favour.

65 The appeal should be dismissed with costs.

66 KIRBY J. This appeal was heard, and is decided, at the same time as the proceedings in *Air Link Pty Ltd v Paterson*[54], which raise similar issues.

Two proceedings raise common issues

67 *Common defects of pleading*: Each matter concerns an accident that allegedly occurred following air carriage of a passenger on a journey wholly within Australia. In consequence of the accident, claims of a right to damages were made. Proceedings based on such claims were commenced in State courts of competent jurisdiction. In each case, the pleading of the claim alleged an entitlement to recover damages. Such claims were expressed in terms of negligence and breach of contract. In neither case was the claim brought with express reference to the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Carriers' Act"). That Act was not mentioned. Nor were all of the facts pleaded that would have been conventional and appropriate to the pleading of a claim based on the Carriers' Act.

68 *Two identical issues*: When the defect of pleading was discovered, two critical issues arose in the courts below. The first was whether, notwithstanding the imperfections of the pleading, the plaintiffs' "right … to damages" under Pt IV of the Carriers' Act survived because the proceedings, as commenced, constituted "an action … brought" by the plaintiff or for the plaintiff's benefit "within two years after the date of arrival of the aircraft ... or … the date on which the carriage stopped". If the proceedings did not amount to "an action" so "brought", the right to damages was, by s 34 of the Act, "extinguished"[55].

69 The second issue, if it was found that the right to damages was "extinguished", was whether, in the circumstances, the "action" could be effectively revived by the exercise by the State court of powers conferred on it by State law to permit an amendment of the original statement of claim so as to re-express the cause of action as one based on Pt IV of the Carriers' Act.

70 *Resolution of the issues*: In each case, the correct answer to the questions, presented by the foregoing issues, is that the proceedings brought by the plaintiff

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54 [2005] HCA 39.

55 Carriers' Act, s 34. The terms of this section are relevantly identical to the provisions of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature at Warsaw on 12 October 1929, [1963] ATS 18, Art 29.1 ("Warsaw Convention"). Although the Warsaw Convention itself did not apply to the air carriage of the passenger, the application of its terms to domestic as well as international air travel was the policy of Pt IV of the Carriers' Act.

within two years qualified as "an action … brought" within that limited time. Thus, the right of the plaintiff to damages was not extinguished by s 34 of the Carriers' Act. The conclusion below to the contrary was erroneous. It should be corrected.

71 In consequence, the second question does not arise, at least on the premise hitherto found, or accepted, that the right to damages was extinguished. Nevertheless, as a matter of principle, where such rights are "extinguished", they cannot be revived by the purported application to them of State law. Any such law would subvert the applicable federal law effecting the extinguishment. The inconsistent State law does not therefore apply. To the extent that it purports to do so it would be invalid under the Constitution.

The disposition of the present appeal

72 *Dispositions in the Supreme Court*: The facts and circumstances of these proceedings are set out in other reasons[56]. So are the applicable provisions of State and federal law to which those now representing Mrs Ann Hatfield ("the respondent") pointed for a favourable answer on the second issue, in the hope of rescuing her from the predicament that arose out of the first[57]. The primary judge in the Supreme Court of Victoria (Ashley J) decided the first issue against the respondent[58]. He decided the second issue in her favour[59].

73 The Court of Appeal of Victoria confirmed both conclusions of the primary judge[60]. The respondent sought to protect herself from the challenge to the determination of the second issue, by filing a notice of contention in this Court stating that the first issue should have also been decided in her favour.

74 *An "action" was brought*: My reasons for concluding that the primary judge and the Court of Appeal erred in the conclusion they respectively reached concerning the first issue are, in substance, the same as the reasons stated by me in disposing of the identical questions of principle in *Air Link*[61]. The alleged

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56 Reasons of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ ("the joint reasons") at [1]-[2]; reasons of Callinan J at [90].

57 The relevant legislation is referred to in the joint reasons at [19]-[23], [41].

58 *Hatfield v Agtrack (NT) Pty Ltd* (2001) 183 ALR 674 at 681 [33].

59 (2001) 183 ALR 674 at 698 [131].

60 *Agtrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63.

61 [2005] HCA 39 at [75]-[84].

facts and the pleadings in the two cases are different. The State rules of court invoked to criticise the pleadings, and to suggest that their manifest defects deprived the claim so initiated of the character of "an action … brought … within two years", are different. However, there is no difference in the essential issue presented for decision. In each case, for the same reasons, the result on the first issue must be the same.

75 The right to damages claimed by the respondent in this case is one conferred by federal law, namely the Carriers' Act. The fact of non-compliance with State laws on procedure and pleading is relevant to, but not determinative of, a plaintiff's compliance with the requirement in s 34 of the Carriers' Act. Nor is it determinative of the suggested extinguishment of the right to damages created by Pt IV of that Act if an action is not brought by or for the benefit of the plaintiff within two years of the date on which (in this case) "the carriage stopped". It remains, in each instance, for a court to give meaning to the phrase "action … is not brought" so as to fulfil the purposes of the federal law. Because that law deliberately chose, even in the case of air carriage within Australia, to apply the same language as appears in the Warsaw Convention, it is necessary to construe the contested phrase so as to achieve its purposes in the Carriers' Act but consistently also with its purpose in the Warsaw Convention.

76 Approaching s 34 of the Carriers' Act in this way, I would conclude that the statement of claim filed on behalf of the respondent sufficiently identified the claim to "damages", brought by her or for her benefit in respect of the accident that occurred during the carriage by aircraft of her late husband. It thus constituted "an action … brought by" her within s 34 of the Carriers' Act.

Amendment of an extinguished action is unlawful

77 *Conclusions on extinguishment*: As in the decision in *Air Link*[62], the foregoing conclusion, which logically comes first in disposing of the issues in the appeal, entitles the respondent to succeed on the issue raised by her in her notice of contention. Because the second issue was answered on an assumption that the right of action by the respondent had been extinguished, the reasoning on that point, at first instance and on appeal, has no remaining application. The premise for the observations is invalidated by the decision of this Court on the first issue.

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62 [2005] HCA 39.

78 Nonetheless, as other members of this Court[63] have expressed their conclusions on the extinguishment issue I will simply say that I agree with those conclusions. My reasons are the same as those expressed by me in *Air Link*[64].

79 *Agreement on other issues*: I also agree with what is said in the joint reasons in this case that the Carriers' Act applied to displace or invalidate the Northern Territory or Victorian laws (whichever was otherwise applicable) in so far as such laws provide by statute for compensation to the relatives of a person who died in circumstances occasioning legal liability in another[65]; that the respondent's action is not properly one arising in tort or contract at all but one based solely on Pt IV of the Carriers' Act[66]; and that the action is one brought in federal jurisdiction[67] with the consequences that flow from that fact[68]. Moreover, I agree that the attachment of federal jurisdiction occurs by operation of law. It is not dependent upon the intentions or expectations of the parties or those who plead initiating court process for them[69].

Consequences for the orders in this appeal

80 *Dismissal of the air carrier's appeal*: It remains to consider the orders that follow from the foregoing conclusions. In disposing of this appeal, this Court is empowered to make the orders that ought to have been made by the courts below[70]. The Court of Appeal dismissed the appeal by Agtrack (NT) Pty Ltd (the appellant in this Court) ("Agtrack") against the orders of the primary judge. Those orders had been in the respondent's favour. They arose, in turn, on summonses brought both by Agtrack and by the respondent herself.

81 The summons by Agtrack sought judgment in Agtrack's favour; alternatively that the proceedings be struck out or permanently stayed and "[s]uch

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63 Joint reasons at [45]-[54]; reasons of Callinan J at [108].

64 [2005] HCA 39 at [100]-[104].

65 Joint reasons at [3]-[5].

66 Joint reasons at [6].

67 Joint reasons at [7].

68 cf *Truong v The Queen* (2004) 78 ALJR 473 at 502-503 [164]-[166]; 205 ALR 72 at 112-113.

69 cf joint reasons at [26] citing *Hume v Palmer* (1926) 38 CLR 441 at 451.

70 *Judiciary Act* 1903 (Cth), s 37.

further order as the Court deems appropriate". The orders made by the primary judge included the order that Agtrack's summons be dismissed[71]. However, in accordance with his conclusion on the second issue, Ashley J acceded to relief sought in the summons brought for the respondent. His Honour granted leave to her to amend her statement of claim to raise a claim under the Carriers' Act[72]. The orders reflecting these conclusions were entered as a judgment of the Supreme Court of Victoria.

82 There is no difficulty in this Court's confirming the dismissal of Agtrack's summons for it is consistent with the conclusion now reached on the first issue that the originating process, imperfect as it was as a pleading, sufficiently answered to an "action … brought" within the time limited by the Carriers' Act, disentitling Agtrack to peremptory relief. To that extent, it is sufficient for this Court simply to dismiss Agtrack's appeal, so affirming the order of the primary judge to that extent.

83 *Confirmation of amendment of pleading*: But should the supplementary order made by Ashley J, permitting leave to the respondent to file an amended statement of claim, stand? Should it do so given that such order was premised, when it was made, on the conclusion that an "action [was] not brought" but that a power was available (now denied by this Court) to amend the initiating process retrospectively in a way that would repair the statement of claim in an action "extinguished" by s 34 of the Carriers' Act?

84 Once it is accepted that the respondent's "right … to damages" under Pt IV of the Carriers' Act was not extinguished for want of the bringing of an "action" in time, such "action" is before the Supreme Court of Victoria. There is then no reason why, in respect of it, any applicable rules of the Supreme Court of Victoria should not be "picked up" so as to be available to that Court for the correction and improvement of the pleading, in order more precisely to state the issues for trial. Certainly, there is no inconsistency between amendment of the pleading of such an "action" and s 34 of the Carriers' Act, so long as a new and different cause of action, or a claim for damages outside the Carriers' Act, is not added to the one already brought (as concluded) in the action under that Act.

85 The result of this analysis is that the disposition of the respondent's proceedings at first instance should stand. However, the reasoning sustaining that disposition is now different from that offered by the Supreme Court. That reasoning is overruled.

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71 (2001) 183 ALR 674 at 699 [140] per Ashley J.

72 (2001) 183 ALR 674 at 699 [139] per Ashley J.

86 This appeal calls attention once again to the need to frame claims arising out of air accidents in terms of the Carriers' Act, not the superseded common or statute law[73]. In this case, as in *Air Link*, it happens that the proceedings were commenced and the "action … brought" within the two year limitation provided by s 34 of the Carriers' Act. However, many other cases have arisen where, for ignorance or oversight of the limitation, the right to damages has been "extinguished". When that happens, the claim to damages is put beyond general powers of revival[74]. State and Territory rules for the amendment of pleadings cannot avail the extinguished action. Fortuitously for the respondent in this case, that outcome does not occur.

Orders

87 I agree in the orders proposed in the joint reasons.

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73 Field, '"Turbulence Ahead': Some Difficulties for Plaintiffs with Air Carriers' Liability for Death and Injury under Australian Law", (2005) 13 *Torts Law Journal* 62. In the Court of Appeal in *Agtrack* (2003) 7 VR 63 at 67 [1] fn 3, Ormiston JA points out that none of the standard Australian torts textbooks makes clear the substitution of legal rights enacted by the Carriers' Act.

74 Shawcross and Beaumont, *Air Law*, 4th ed (2005), vol 1, par VII[443] referring to reported dismissals of actions brought out of time in Australia, England, Scotland, France, Greece, United States and Canada.

88 CALLINAN J. These reasons should be read with the reasons for judgment in *Air Link Pty Ltd v Paterson*[75].

89 As in that case, the ultimate question here is whether the respondent brought action within the two years' limitation period prescribed by s 34 of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Act").

Factual matters

90 To the outline of the facts in the judgment of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ, I would add some of the paragraphs pleaded by the respondent in her statement of claim in its first, that is, its unamended form.

> "1. At all relevant times the Defendant was carrying on the business of aircraft charter under the name of Spring Air.
>
> 2. On or about the 13th August, 1997, the Defendant, its servants and agents, had agreed with Stephen James Hatfield ('the deceased') and two others ('the passengers') to carry the deceased and the passengers on a sight-seeing tour in a Cessna 210 ('the aircraft').
>
> ...
>
> 3. On or about the 14th August, 1997, the aircraft, piloted by Peter Spanovskis, deceased ('the pilot'), and carrying the deceased and the passengers, crashed ('the accident').
>
> 4. The accident was caused by the negligence of the Defendant, its servants and agents, including the pilot and the chief pilot, Anthony Langdon Spring.
>
> [The respondent then pleaded a number of particulars of negligence which need not be set out.]
>
> 5. It was an implied term of the agreement that the Defendant, its servants and agents, would take reasonable care for the safety of the deceased and the passengers on the said tourist flight ('the implied term').
>
> 6. In breach of the implied term, the Defendant, its servants and agents, failed to use reasonable care in the safety of the deceased and the passengers in the conduct of the tourist flight ('the breach').

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75 [2005] HCA 39.

...

7. As a result of the breach and the negligence of the Defendant, its servants and agents, the deceased died on the 14th August, 1997.

8. The Plaintiff brings this action as the widow of the deceased for her benefit."

There then followed details of the respondent's dependency upon her late husband, and his likely earnings and prospects as are conventionally pleaded in actions brought under *Lord Campbell's Act* or its analogues in the States and Territories.

91 The Warsaw Convention upon which the Act is based is intended to operate not only in many countries of greatly differing legal systems, but also in all jurisdictions of each of those countries. In Australia, it is easy to envisage a claim, for example, in respect of lost baggage, for a small amount in a magistrates' court. Until very recent times at least[76], generally the formality and particularity of pleading required for the commencement of proceedings in a court varied according to the position in the hierarchy of the courts of the court whose jurisdiction was sought to be invoked.

92 There can be no doubt however that the Act, which displaces any law which might otherwise be applicable, requires for its due invocation, that whatever is done in the jurisdiction sought to be enlivened, can be seen to amount to the bringing of an action, within two years of the event giving rise to it. This is so, even though the jurisdiction is federal jurisdiction, whether invoked in a State court vested with it pursuant to s 39 of the *Judiciary Act* 1903 (Cth) or otherwise. It is not suggested that the proceedings here could not be, or should not have been brought, as they were, in the Supreme Court of Victoria. It is accordingly necessary to ascertain whether what the respondent did here could properly be characterized as bringing an action within two years of her husband's death, and that in turn requires an analysis of the requirements for the bringing of an action in the Supreme Court of Victoria.

93 Rule 5.01 of the Supreme Court (General Civil Procedure) Rules 1996 (Vic) ("the Rules") defines "originating process" as a "writ, originating motion or other process by which a proceeding is commenced".

94 Rule 5.02 provides that a writ should be in Form 5A which is as follows:

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76 In some States uniform civil procedure rules relating to civil proceedings in more than one jurisdiction have been introduced: see for example Uniform Civil Procedure Rules 1999 (Q) which stipulate uniform procedures for the Supreme Court, District Court and Magistrates Courts in Queensland (r 3.1).

"Form 5A

WRIT

IN THE SUPREME COURT

OF VICTORIA

AT

BETWEEN

Plaintiff

and

Defendant

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by –

(a) filing a 'Notice of Appearance' in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and

(b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

*THE PROPER TIME TO FILE AN APPEARANCE is as follows –

(a) where you are served with the writ in Victoria, within 10 days after service;

(b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;

(c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;

(d) where you are served with the writ in any other place, within 42 days after service.

IF the plaintiff claims a debt only and you pay that debt, namely, $ and $ for legal costs to the plaintiff or his solicitor within the proper time for appearance, this proceeding will come to an end. Notwithstanding the payment you may have the costs taxed by the Court.

FILED

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

..."

There is provision of a space on the document for the inclusion of an indorsement.

95 Rule 5.04(2) specifies the contents of an indorsement of claim which each writ must bear:

"(a) a statement of claim; or

(b) a statement sufficient to give with reasonable particularity notice of the nature of the claim and the cause thereof and of the relief or remedy sought in the proceeding."

96 Unless therefore the unamended writ and indorsement filed by the respondent within time, contained either a statement of claim, or a statement sufficient to give with reasonable particularity notice of the nature of the claim, and the cause thereof, and of the relief or remedy sought, she could not be regarded as having brought action within time as required by s 34 of the Act.

97 I have concluded that this question should be answered in favour of the respondent.

98 The fact that she had in mind a claim of the kind to which *Lord Campbell's Act* gives rise, and may have been completely unaware of the Act, its special provisions and its displacement of all other causes of action, does not defeat her right to proceed under the Act.

99 As I have observed in *Air Link Pty Ltd v Paterson*, the words "cause of action" do not have one meaning for all purposes and all occasions. Rule 5.04 of the Rules does not even use the full expression "cause of action". There is no reason why "cause", the word actually used, should not be understood as the event or circumstances giving rise to the claim. So too, "the nature of the claim" can be understood as the type of claim, that is a claim for damages, just as the relief or remedy can be understood as a claim for damages arising out of, or as a result of the death of a passenger[77] caused by an accident in the course of the operation of the aircraft[78]. That the accident may have been caused negligently is of no significance, and any pleading of that can be disregarded or struck out.

100 Paragraphs 1, 2, 5 and 6 of the unamended statement of claim at least imply that the appellant was engaged in a commercial activity of aircraft charter, and that the deceased's engagement of it, and flight on its aircraft were of a commercial character. The language of implied terms used in par 5 in particular would hardly be apt otherwise. As to the route, destination and terminus of the flight, it is enough that one destination in the Northern Territory, to which the Act is applicable, at least is identified, that is Timber Creek.

101 Although the statement of claim contains much that is surplusage to a claim under the Act, what it does contain is sufficient for a court to say that action has been brought by the filing of the writ, indorsed as it was, with the unamended statement of claim.

102 At first instance Ashley J thought the respondent's unamended statement of claim deficient in failing to identify, not only the Act, but also the relevant specific provision of it enabling her to claim as required by r 13.02(1)(b) of the Rules which provides as follows:

> "(1) Every pleading shall –
>
> ...

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77 *Civil Aviation (Carriers' Liability) Act* 1959 (Cth), s 35.

78 *Civil Aviation (Carriers' Liability) Act* 1959 (Cth), s 28.

(b) where any claim, defence or answer of the party arises by or under any Act, identify the specific provision relied on".

103 It is true that the respondent did purport, by heading her indorsement on the writ, "statement of claim", to elect to adopt alternative (a) of r 5.04(2) of the Rules. The fact however that she did so, does not mean that she has not complied with r 5.04, that is, by issuing a sufficient writ and by providing in it, as she did, the reasonable particularity that r 5.04(2)(b) requires.

104 It would be anomalous if, having complied with one part of r 5.04, the respondent should be taken not to have issued a sufficient originating process because she failed to comply with another part of it, on the basis only that she misdescribed her indorsement as a statement of claim, that being so only because it did not identify the specific provision of an Act to be relied upon.

105 Regard should be had also to r 14.01 which provides that:

"Where an indorsement of claim on a writ constitutes a statement of claim in accordance with Rule 5.04, no statement of claim shall be served."

106 It is important to notice that the rule uses the word "constitutes" and not "is or purports to be". In short, unless the indorsement constitutes a statement of claim, a statement of claim must be served within 30 days after the entry of an appearance as required by r 14.02 which also uses the word "constitute". What has happened here may therefore be analyzed in this way. Rule 5.04(2)(b) has been complied with by the respondent for the reasons that I have given. Despite that she and her advisers may have thought that they had filed a writ with an indorsement of claim containing a statement of claim, they did not do so because the indorsement lacking as it did the identification of the relevant specific provision did "not constitute a statement of claim" in fact. Indeed it was then open, indeed obligatory for the respondent to serve a document truly constituting a statement of claim 30 days after the appellant's appearance, or within such further time as the court might allow. Accordingly O 13 did not operate to deny, as was held below, that the respondent had done what was necessary to bring an action within two years of the relevant events as required by the Act.

107 There is a further reason why the conclusion that I have just stated is the correct one. It is that the pleadings in the case should be read as a whole, and the defence containing all appropriate references to the Act having also been delivered before the expiration of the two years, should be read with the statement of claim and as giving to it all the particularity that either branch of r 5.04(2) requires.

108 In addition to what I have said in *Air Link Pty Ltd v Paterson*, with respect to extinguishment, I would make the point that ss 79 and 80 of the *Judiciary Act* cannot operate to pick up a State rule, or rules of court such as those designed to

alter the common law as stated in *Weldon v Neal*[79], and which would, if operative, have the effect of amending or detracting from the operation of a federal enactment, here the Act.

109 I would dismiss the appeal with costs.

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79 (1887) 19 QBD 394.