# HIGH COURT OF AUSTRALIA

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

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**Matter No S420/2004**

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| AIR LINK PTY LIMITED | APPELLANT |
| AND | |
| MALCOLM IAN PATERSON | RESPONDENT |

**Matter No S57/2005**

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| MALCOLM IAN PATERSON | APPLICANT |
| AND | |
| AIR LINK PTY LIMITED | RESPONDENT |

*Air Link Pty Limited v Paterson*
*Paterson v Air Link Pty Limited*
[2005] HCA 39
*10 August 2005*
S420/2004 and S57/2005

**ORDER**

**Matter No S420/2004**

*Appeal dismissed with costs.*

**Matter No S57/2005**

1. *Special leave to appeal granted.*

2. *Appeal allowed with costs.*

3. *Set aside orders 2, 3 and 4 of the orders of the Court of Appeal of the Supreme Court of New South Wales entered on 27 September 2002 and in their place order that the appeal to that Court is dismissed with costs.*

On appeal from the Supreme Court of New South Wales

**Representation:**

**Matter No S420/2004**

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

D F Jackson QC with P A Regattieri for the respondent (instructed by M J Duffy & Son)

**Matter No S57/2005**

D F Jackson QC with P A Regattieri for the applicant (instructed by M J Duffy & Son)

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

**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

### Air Link Pty Limited v Paterson

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 personal injury to a passenger resulting from an accident which took place on board an aircraft in the course of commercial transport operations or in the course of embarking or disembarking – Passenger sustained personal injury whilst disembarking from aircraft – Action brought by passenger – Whether action in exercise of right to damages brought within two years of the date of aircraft's arrival at destination – Whether right to damages extinguished.

Aviation – Carriage by air – Liability of carrier – 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.

Aviation – Carriage by air – Liability of carrier – Carriage within New South Wales and between Queensland and New South Wales conducted by different carriers – Whether that part of carriage conducted within New South Wales is deemed to be carriage between a place in a State and a place in another State – Whether carriage was in successive stages, was regarded by the parties as a single operation and was carriage to which Carriers Act, Pt IV would apply were the whole of the carriage to be performed by a single carrier.

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.

Pleading – Amendment – Provision in Pt 17 r 4 of the District Court Rules 1973 (NSW) for amendment to statement of claim after expiry of relevant limitation period – Whether Pt 17 r 4 is beyond the rule-making power in s 161 of the *District Court Act* 1973 (NSW) – Relevance of substantive nature of limitation provisions.

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

*Civil Aviation (Carriers' Liability) Act* 1959 (Cth), Pt IV.
*Judiciary Act* 1903 (Cth), ss 79, 80.
*District Court Act* 1973 (NSW).
District Court Rules 1973 (NSW).

Convention for the Unification of Certain Rules Relating to International Carriage by Air ("Warsaw Convention"), opened for signature at Warsaw, 12 October 1929, [1963] ATS No 18.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND HEYDON JJ. By Ordinary Statement of Claim issued out of the District Court of New South Wales at Dubbo on 22 September 2000, Mr Paterson claimed damages in respect of personal injuries he allegedly sustained on 25 September 1998 when alighting at Dubbo Airport from the aircraft of Air Link Pty Limited ("Air Link") after a flight from Cobar to Dubbo.

2 In its Grounds of Defence dated 8 March 2001, Air Link pleaded that its carriage of Mr Paterson had been subject to Pt IV of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Carriers' Act") and that its liability under Pt IV in respect of the alleged injuries was in substitution for any civil liability under any other law.

3 Part IV of the Carriers' Act comprises ss 26-41. Section 36 provides that, with a qualification not presently material:

> "the liability of a carrier under this Part in respect of personal injury suffered by a passenger, not being injury that has resulted in the death of the passenger, is in substitution for any civil liability of the carrier under any other law in respect of the injury".

4 Black DCJ dismissed a motion by Air Link that the proceeding be dismissed and, on the application of Mr Paterson, struck out an allegation in the Grounds of Defence that the action was not maintainable. His Honour rejected Air Link's submission that the Statement of Claim did no more than allege actions in negligence and contract and could not be regarded as an action brought under Pt IV of the Carriers' Act.

5 On 26 March 2002, an appeal by Air Link to the Court of Appeal (Mason P, Sheller and Beazley JJA) succeeded ("*Air Link [No 1]*")[1]. The orders made by the Court of Appeal were treated by the parties as upholding the contention of Air Link that the proceeding as pleaded in the Statement of Claim was not maintainable.

6 The sequel was a successful application by Mr Paterson to Graham DCJ for leave to amend the Statement of Claim in terms clearly and exclusively relying on Pt IV of the Carriers' Act. That application was filed on 24 April

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**1** [2002] NSWCA 85.

2002, well outside the two year period fixed by s 34 of the Carriers' Act. Section 34 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."

7 However, Graham DCJ held that under the District Court Rules there was power to allow the amendment and that "the power is not removed because of any inconsistency between those rules and s 34 of the [Carriers' Act]". An appeal by Air Link to the Court of Appeal (Mason P and Beazley JA; Ipp JA dissenting) was dismissed on 11 September 2003 ("*Air Link [No 2]*")[2].

8 Two proceedings are before this Court. They were heard with the appeal in *Agtrack (NT) Pty Ltd v Hatfield*[3] and what follows is to be read with the reasons for dismissing that appeal.

9 The course of the litigation in all three cases invites attention to the following statement by Dean Griswold. He wrote that[4]:

> "the question 'What law is applicable?' must be disposed of in every case which comes before a court. Even if all the elements are local we have to decide that local law applies, and, though it may be assumed or done unconsciously, this is not an essentially different process from that involved where we decide that some foreign law controls because there

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**2** *Air Link Pty Ltd v Paterson (No 2)* (2003) 58 NSWLR 388.

**3** [2005] HCA 38.

**4** Griswold, "Renvoi Revisited", (1938) 51 *Harvard Law Review* 1165 at 1166-1167n.

are foreign elements in the situation. Every case in court involves a choice of law."

10 These remarks are no less and, indeed, more plainly applicable where, as in Australia, the "local law" includes federal law and the rights at stake in a case may arise under a federal law and the forum may be a court of a State exercising federal jurisdiction with which it has been invested. There is a risk of unconscious assumption that the controlling body of law is that ordinarily applied by the State court under the laws of the State or, at least, that those laws provide the starting point for legal analysis. Such a tendency was apparent in some of the submissions to this Court in all three cases.

11 The first of the two proceedings for determination here is an appeal by Air Link against *Air Link [No 2]*. The issue in that proceeding turns upon the construction of s 34 of the Carriers' Act, in particular the term "is extinguished". It follows from the reasoning in *Agtrack* that it was only open to Graham DCJ to permit the amendment if in the events that had happened an action had been brought by Mr Paterson within two years of 25 September 1998.

12 That raises the issue in the second proceeding, an application for special leave to appeal from *Air Link [No 1]*. The issue here is whether, contrary to the decision of the Court of Appeal, an action had been brought by Mr Paterson under Pt IV and instituted by the Statement of Claim issued on 22 September 2000, and thus within the two year period fixed by s 34 of the Carriers' Act. That issue should be answered favourably to Mr Paterson. Special leave should be granted in respect of *Air Link [No 1]*, the appeal should be treated as heard instanter and should be allowed.

13 In the exercise by the District Court of federal jurisdiction in the matter arising under Pt IV of the Carriers' Act, there was no footing for the attachment of common law claims, in tort or contract. By force of s 36 of the Carriers' Act, the liability of Air Link to Mr Paterson under Pt IV was in substitution for any such rights. Section 80 of the *Judiciary Act* 1903 (Cth) provided that the common law governed the District Court in the exercise of its federal jurisdiction only so far as the common law was applicable and not inconsistent with a federal law such as s 36. Thus the allegations in the Statement of Claim apt to found actions in negligence and contract were surplusage.

14 The consequence of this outcome in *Air Link [No 1]* is that it was competent for the District Court to grant leave for the filing of the amended Statement of Claim and that the order of the Court of Appeal in *Air Link [No 2]* dismissing the appeal from that order should stand. However, the reasoning of

the Court of Appeal for this conclusion turned upon a construction of s 34 of the Carriers' Act which is contrary to that now explained in *Agtrack*. The result is that the order of the Court of Appeal in *Air Link [No 2]* stands but is to be supported on other grounds.

15 Reference was made in argument to the earlier decision of the New South Wales Court of Appeal in *Proctor v Jetway Aviation Pty Ltd*[5] and its significance for the construction of s 34 of the Carriers' Act. *Proctor* concerned an action by the husband of a passenger killed in the crash of a charter flight involving purely intrastate carriage. The relevant statute was a New South Wales law, the *Civil Aviation (Carriers' Liability) Act* 1967 (NSW) ("the State Act").

16 Section 5 of the State Act applied Pt IV of the Carriers' Act as if it was incorporated in the State Act. The Statement of Claim in *Proctor* had been filed within the time limited by s 34 but the appeal was fought on the basis that the pleading had not been cast in the necessary form to satisfy Pt IV as applied by s 5 of the State Act. An amendment after the two year period to indicate clearly reliance upon the State Act (rather than the *Compensation to Relatives Act* 1897 (NSW)) was allowed. Priestley JA indicated[6] that the amendment was allowed under provisions of the Supreme Court Rules[7] which had come into force as a Schedule to the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act") and which treated amendments as effective from the date of filing of the original pleading.

17 The State Act was earlier legislation and s 34, as applied by the State Act, was to be read as subject to the later provisions in the Supreme Court Act.

18 Nothing decided in *Proctor* touches the present litigation. Here the Carriers' Act directly applies. There may be difficulties in accommodating the reasoning in *Proctor* to a provision subsequently included in the State Act by the *Civil Aviation (Carriers' Liability) Amendment Act* 1996 (NSW). Section 6A(1) of the State Act now states:

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**5** [1984] 1 NSWLR 166.

**6** [1984] 1 NSWLR 166 at 186.

**7** Pt 20, rr 1(1), 4.

> "It is the intention of Parliament that the applied provisions should be administered and enforced as if they were provisions applying as laws of the Commonwealth instead of being provisions applying as laws of the State."

However, the construction of s 6A(1) may be left for another occasion in which it is immediately relevant.

19 It remains in these reasons to indicate why the appeal in *Air Link [No 1]* should be allowed. This requires further attention to the provisions of Pt IV of the Carriers' Act.

20 Part IV applies to the carriage of a passenger where the passenger is carried on an aircraft operated by the holder of an airline licence or a charter licence in the course of commercial transport operations under a contract of carriage of the passenger between a place in a State and a place in another State (s 27(1)). Section 27(4) is important for the circumstances of the carriage of Mr Paterson. This sub-section provides:

> "For the purposes of this section, where:
>
> (a) the carriage of a passenger between two places is to be performed by two or more carriers in successive stages;
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> (b) the carriage has been regarded by the parties as a single operation, whether it has been agreed upon by a single contract or by two or more contracts; and
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> (c) this Part would apply to that carriage if it were to be performed by a single carrier under a single contract;
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> this Part applies in relation to a part of that carriage notwithstanding that that part consists of carriage between a place in a State and a place in the same State."

21 Where Pt IV applies to the carriage of a passenger, the carrier is liable for damage sustained by reason of any personal injury suffered by the passenger resulting from an accident which took place in the course of any of the operations of disembarking (s 28).

22 Paragraph 4 of the Statement of Claim was expressed in terms which attract s 28. The paragraph read:

> "When alighting from [Air Link's] aircraft at Dubbo Airport, at about 4.00 pm, on or about 25 September 1998, [Mr Paterson] stepped on to a set of stairs at the bottom of the stairway of [Air Link's] aircraft. The set of stairs was not properly and safely positioned and turned over underneath [Mr Paterson], causing him to fall onto the ground, as a consequence of which he suffered injuries loss and damage."

23 Paragraph 2 of the Statement of Claim asserted that Air Link was authorised under the *Air Transport Act* 1964 (NSW) to operate "a commuter and charter airline in New South Wales". There was no allegation that Air Link held an "airline licence" or a "charter licence" as defined in s 26(1) of the Carriers' Act. The definitions in s 26(1) are answered by the existence of an Air Operator's Certificate ("AOC") which is in force under the *Civil Aviation Act* 1988 (Cth) ("the CAA") and which authorises respectively airline operations or charter operations.

24 Attention must be given to s 27 of the CAA. Except as authorised by an AOC, Air Link aircraft were not to operate in Australian territory for commercial purposes prescribed by reg 206 of the Civil Aviation Regulations 1988. The commercial purposes so prescribed included the purpose of transporting persons generally for hire or reward in accordance with fixed schedules to and from fixed terminals over specific routes with or without intermediate stopping places between terminals (reg 206(1)(c)), and charter purposes being the carriage of passengers for hire or reward to or from any place not being carriage in accordance with fixed schedules to and from fixed terminals (reg 206(1)(b)). Section 27 is within Pt III of the CAA, as is s 29. Section 29(1)(b) constitutes it an offence for the owner, operator, hirer or pilot of an aircraft to operate the aircraft or permit its operation in contravention of a provision of Pt III.

25 There is a long-established principle that a person is to be taken to have conformed to the law until "something shall appear to shake that presumption"[8]. More particularly, as Lord Ellenborough CJ put it in *Williams v The East India Company*[9]:

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**8** *R v Hawkins* (1808) 10 East 211 at 216 [103 ER 755 at 758]; affirmed *Hawkins v The King* (1813) 2 Dow 124 [3 ER 810].

**9** (1802) 3 East 192 at 199 [102 ER 571 at 574].

> "[the] rule of law is, that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary, that is, in such case of proving a negative, on the other side".

26 Accordingly, from the allegation by Mr Paterson that he had been carried by aircraft operated by Air Link, it was to be taken in favour of Mr Paterson that Air Link had any necessary AOC. This was to be presumed in favour of Mr Paterson until the unlikely event of its denial by Air Link.

27 That the carriage was in the course of operations in which the aircraft was used for hire or reward for the carriage of passengers, and thus "commercial transport operations" within the meaning of s 27(1) of the Carriers' Act[10], appeared from the allegation in par 8 of the Statement of Claim that Mr Paterson had purchased ticket No 4463500449 on or about 20 September 1998 and that this included Air Link's flight 648 from Cobar to Dubbo on 25 September 1998.

28 The terms of the ticket which were later in evidence provided for travel on 20 September 1998 between the Gold Coast and Sydney, between Sydney and Dubbo and between Dubbo and Cobar, and on 25 September 1998 from Cobar to Dubbo, Dubbo to Sydney and Sydney to the Gold Coast. The ticket was issued on 20 September 1998 by Qantas Airways Ltd at Coolangatta Airport in Queensland. The carriage between the Gold Coast and Sydney and Sydney and the Gold Coast was to be performed by a carrier other than Air Link.

29 These circumstances meet the criteria specified in s 27(4) of the Carriers' Act whereby Pt IV applies in relation to carriage between two places in the same State. The carriage of Mr Paterson was to be performed by two or more carriers in successive stages; it was regarded by the parties as a single operation and Pt IV would apply to the whole of the carriage were it to be performed by a single carrier.

30 Although the Statement of Claim identified the particular ticket number it did not set out the sectors of carriage for which the ticket provided. However, as explained in *Agtrack*, the determination of an issue whether an action under Pt IV

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**10** The term "commercial transport operations" is defined in s 26(1) as meaning "operations in which an aircraft is used, for hire or reward, for the carriage of passengers or cargo".

had been brought within the two year period prescribed by s 34 of the Carriers' Act is not dictated by the rules of pleading, if any, which applied in the court where the action relied upon was instituted. As it happened, Pt 9, r 5 of the District Court Rules 1973 stated:

> "Where any document is, or spoken words are, referred to in a pleading:
>
> (a) the effect of the document or of the spoken words shall, so far as material, be stated, and
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> (b) the precise terms of the document or spoken words shall not be stated, except so far as those terms are themselves material."

31 Black DCJ had approached the matter correctly and on the footing that a specified ticket had been identified in the Statement of Claim and it was permissible to leave as a matter of evidence the element of interstate carriage indicated by the sectors of travel shown on the face of that ticket. This evidence was admissible on the later determination of a dispute as to whether an action under Pt IV had been brought within time and federal jurisdiction accordingly had been attracted.

32 The decision of the Court of Appeal in *Air Link [No 1]* turned upon the absence from the Statement of Claim of mention of or reference to Pt IV of the Carriers' Act. However, as has been explained in *Agtrack*, that absence did not dictate a negative answer to the question of whether federal jurisdiction had been engaged in a matter arising under Pt IV.

33 The appeal in *Air Link [No 2]* should be dismissed with costs. In respect of *Air Link [No 1]*, special leave should be granted, the appeal treated as heard instanter and allowed with costs; orders 2, 3 and 4 of the orders of the New South Wales Court of Appeal entered 27 September 2002 should be set aside and the appeal to the Court of Appeal should be dismissed with costs.

34 KIRBY J. More than fifty years ago, K M Beaumont, writing on difficulties of construction of the Warsaw Convention on International Carriage by Air ("Warsaw Convention")[11], remarked[12]:

> "almost every Article of the existing Convention includes defects or obscurities, and some of them contain several. These are not merely theoretical or technical defects. On the contrary they cause almost daily practical difficulties and problems".

Despite such difficulties and problems, subsequent revisions of the Warsaw Convention have "addressed only a small proportion of the apparent difficulties with the language" of the original text[13].

35 Two proceedings are before this Court. They present the latest such difficulties. One is an appeal from a judgment of the New South Wales Court of Appeal[14] in proceedings known as *Air Link No 2*. After the commencement of those proceedings, because of reservations expressed in this Court concerning the disposition of an earlier stage of the dispute between the parties, an application was made for special leave to appeal from that earlier disposition[15]. That application concerns the proceedings in *Air Link No 1*.

36 The two proceedings arise out of an apparent oversight of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Carriers' Act") on the part of those who originally pleaded the initiating process in the case. The pleader framed the claims in conventional language, expressed as claims for damages for common law negligence and breach of contract[16]. No such causes of action exist under Australian law in respect of air carriage injuries. They have been abolished by the Carriers' Act. Entitlements under that Act, of a different legal character, have been substituted.

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**11** 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.

**12** Beaumont, "Need for Revision and Amplification of the Warsaw Convention", (1949) 16 *Journal of Air Law and Commerce* 395 at 411-412.

**13** *South Pacific Air Motive Pty Ltd v Magnus* (1998) 87 FCR 301 at 334.

**14** *Air Link Pty Ltd v Paterson (No 2)* (2003) 58 NSWLR 388 ("*Air Link No 2*").

**15** *Air Link Pty Ltd v Paterson* [2002] NSWCA 85 ("*Air Link No 1*").

**16** The relevant paragraphs of the statement of claim are set out in the reasons of Callinan J at [110].

37 In respect of air carriage within Australia, the Carriers' Act has imported, and applied, as part of Australian municipal law, provisions of the Warsaw Convention, to which Australia is a party. By one such provision[17], the "right of a person to damages" under that Act 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".

38 In this matter, an "action" was "brought" by the passenger within the time specified. However, the initiating process made no reference to the Carriers' Act, the applicable Part of that Act, or the substitution there effected of federal statutory entitlements for damages for the common law entitlements purportedly sued for. It is this feature of the case that presents the two central questions in these proceedings. In the application in *Air Link No 1*, the question is whether the mispleaded "action", brought by the passenger, complies sufficiently with the Carriers' Act so as to avoid the extinguishment of the passenger's right to damages under the applicable Part of that Act. In the appeal in *Air Link No 2*, the question is whether, if an "action" was not "brought" as required, the right to damages was "extinguished" by the Carriers' Act, forbidding the invocation of State law to permit a subsequent amendment of the pleading to add a cause of action based on the Carriers' Act.

39 Upon each of these issues, I come to the same conclusion as the other members of this Court. However, I cannot feel the same confidence in the conclusions as my colleagues express[18]. I am conscious that, upon the first issue ("action brought"), this Court is differing from a unanimous opinion of the Court of Appeal of New South Wales in *Air Link No 1*. Moreover, that is an opinion followed by the Court of Appeal of Victoria[19] in the associated appeal heard concurrently with these proceedings[20]. The decisions now reversed on this point are well reasoned and persuasive.

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**17** Carriers' Act, s 34; cf Warsaw Convention, Art 29.1.

**18** cf *In re Hoyles; Row v Jagg* [1911] 1 Ch 179 at 184 per Fletcher Moulton LJ.

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

**20** Not without reservations expressed by the participating judges: see *Agtrack* (2003) 7 VR 63 at 78 [23] per Ormiston JA ("with some reluctance"), 105 [87] per O'Bryan AJA ("a degree of hesitancy"). The primary judge in *Agtrack*, Ashley J, reached a firm view similar to that of the New South Wales Court of Appeal in *Air Link No 1*: see *Hatfield v Agtrack (NT) Pty Ltd* (2001) 183 ALR 674 at 681 [33].

40 Usually, this Court would refrain from disturbing a conclusion of a State Supreme Court on matters of court rules, practice and procedure[21]. However, the Carriers' Act imports into air carriage within Australia language derived from the Warsaw Convention and its successors[22]. Therefore, as a matter of logic, a decision on each of the points argued in these proceedings applies to a much wider class of air carriage. Accordingly, the decision must be reached by this Court with close attention to any relevant developments of international law, including decisions of the municipal courts of other states parties to the Warsaw Convention system.

41 Fifteen years ago, in the New South Wales Court of Appeal in *Fernance v Nominal Defendant*[23] – a case wholly concerned with State law and without any borrowings from international law – I suggested (in dissent) the need to differentiate a case involving amendments of defective pleading where a party is in "default in expressing the claim" from a case where an attempt is made to breathe life "into an extinct cause of action, overlooked and never acted upon"[24]. Now, in the present context, that problem returns to this Court for solution.

42 In my view, there is a difference, in the application of a statutory limitation of action, between a case where "an action is not brought" at all within the specified time and one where "an action is … brought" which is defective, but not fatally so, in its expression. It is this distinction that proves determinative in the present case. However, for me, it is a close-run thing. The case is at the borderline, as the reasons of the courts below and the arguments of the parties indicate. In order to refine the reasons for my conclusion, I will demonstrate the not inconsiderable case presented for the opposite outcome.

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**21** *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 87-88 [40]; *In the Matter of an Application by the Chief Commissioner of Police (Vic)* (2005) 79 ALJR 881 at 897 [96]; 214 ALR 422 at 444; cf *R v Elliott* (1996) 185 CLR 250 at 257.

**22** Warsaw Convention, Art 29.1 (Sched 1 to the Carriers' Act); Warsaw Convention as amended at the Hague, Art 29.1 (Sched 2); Montreal No 3 Convention (Warsaw Convention as amended by the Hague Protocol, Ch I of the Guatemala City Protocol and Ch I of the Montreal Protocol No 3), Art 29.1 (Sched 4).

**23** (1989) 17 NSWLR 710.

**24** (1989) 17 NSWLR 710 at 730.

"ACTION … BROUGHT … WITHIN TWO YEARS"

The facts and federal jurisdiction

43 The facts of this matter are set out in other reasons[25]. Those then representing the plaintiff, Mr Malcolm Paterson, pleaded a statement of claim in the District Court of New South Wales by which he commenced proceedings against Air Link Pty Ltd ("Air Link"). They did so in an imperfect and defective way[26]. The applicable provisions of the Carriers' Act are set out in other reasons[27]. So is a description of the structure and origins of that Act, counterpart State legislation and provisions of the District Court Rules 1973 (NSW) invoked for Mr Paterson[28]. I will not repeat any of this material. I incorporate it by reference.

44 In the pleaded circumstances it is now common ground that the only claim for damages that Mr Paterson enjoyed in law was under the Carriers' Act, a federal law. Likewise it is agreed that, albeit unconsciously, his initiating process necessarily invoked federal jurisdiction, vested in the District Court in accordance with the Constitution[29].

45 A similar case of the unconscious invocation of federal jurisdiction arose in *Truong v The Queen*[30]. That was a case involving extradition of the applicant to Australia. Accordingly, it attracted the provisions of the *Extradition Act* 1988 (Cth). A suggested defect in compliance with that Act was only later noticed. It was then claimed that the rule of speciality had not been observed.

46 In *Truong* I drew attention to the fact that it is not uncommon for Australian courts to proceed without noticing an applicable federal law. Often they purport to resolve issues which such federal law presents for the outcome of

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**25** Reasons of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ ("the joint reasons") at [1]-[7]; reasons of Callinan J at [107]-[115].

**26** Reasons of Callinan J at [110].

**27** Joint reasons at [6], [20]; reasons of Callinan J at [119]-[122].

**28** Joint reasons at [23]-[24], [30].

**29** Constitution, s 77(iii).

**30** (2004) 78 ALJR 473 at 502-503 [163]-[166]; 205 ALR 72 at 112-113.

a case without referring to or mentioning that law[31]. Nevertheless, the attraction of federal jurisdiction occurs by operation of law. It is not dependent on the intention, awareness or beliefs of the parties.

Approach to interpretation

47 The issue on this aspect of the proceedings (which arises directly in the application for special leave to appeal from the decision of the Court of Appeal in *Air Link No 1*) is whether Mr Paterson's "right … to damages" under the Carriers' Act was extinguished by that Act on the ground that "an action [was] not brought by him … within two years after the date of arrival of the aircraft". Clearly, an "action" of sorts was "brought". But was it an "action" of the kind to which s 34 of the Carriers' Act referred? Or was it a proceeding (to use a neutral word) that did not amount to an "action" for this purpose?

48 The question arising as to the meaning of s 34 is the same as that presented by Art 29 of the Warsaw Convention[32]:

> "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."

49 In accordance with established principles of interpretation governing Australian legislation, designed to give effect to the language of international law to which Australia has subscribed, the expression in the Carriers' Act must, if possible, be given the same interpretation as has been adopted by equivalent courts of other states parties[33]. No differentiation could be drawn on the basis

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**31** (2004) 78 ALJR 473 at 503 [166]; 205 ALR 72 at 112-113. *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 69 [98] was cited as an illustration.

**32** Article 29 of the Warsaw Convention is unchanged in the succeeding modifications of that Convention.

**33** *Povey v Qantas Airways Ltd* (2005) 216 ALR 427 at 456-457 [128]-[134]; cf *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2004) 216 CLR 418 at 466-467 [153]-[154]; *Sidhu v British Airways Plc* [1997] AC 430 at 438, 440-442, 444-445, 450-453; *El Al Israel Airlines Ltd v Tsui Yuan Tseng* 525 US 155 at 169-170 (1999); Corney, "Mutant Stare Decisis: The Interpretation of Statutes which Incorporate International Treaties into Australian Law", (1994) 18 *University of Queensland Law Journal* 50.

that it was not obligatory for Australia to apply the language of the Warsaw Convention to domestic carriage by air within Australia. Having elected to do so, it must be assumed that an interpretation consistent with any given to the treaty provisions should be adopted, in so far as the treaty language was borrowed.

Judicial dispositions of the case

50 *Decision at first instance*: Black DCJ, the primary judge in the District Court of New South Wales, rejected Air Link's motion to dismiss the proceedings. He noted that Mr Paterson's statement of claim had been filed within two years of the accident. He recorded the provisions of s 34 of the Carriers' Act and the abolition by that Act of other causes of action different from the statutory remedy there provided for air carriage accidents[34]. However, he pointed out that a pleading in the District Court need contain only a statement in "summary form of the material facts" and not the evidence[35]. He accepted the defects of the pleading so far as reliance on the Carriers' Act was concerned. However, he concluded that it was not necessary for the pleading to name the Carriers' Act expressly. He considered that, on its face, the statement of claim sufficiently notified Air Link that Mr Paterson was claiming that he was a passenger in air carriage, pursuant to a specified air ticket, on an aircraft operated by the company on a given day which was "duly authorised to operate a commuter and charter airline" and that he had suffered an accident when disembarking the aircraft at Dubbo in New South Wales[36].

51 The primary judge therefore found that this statement of the facts was sufficient to engage the Carriers' Act. This meant that the initiating process constituted an "action … brought within s 34 of the [Carriers' Act]"[37]. Black DCJ concluded that it was therefore unnecessary to allow an amendment to the statement of claim. He expressed doubt that there was any power to do so because it would amount to "backdating … to revive a matter which is subject to Commonwealth legislation"[38].

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**34** Carriers' Act, s 36.

**35** District Court Rules 1973 (NSW), Pt 9 r 3(1).

**36** *Paterson v Air Link Pty Ltd* unreported, District Court of New South Wales, 18 May 2001 at 9. By s 27 of the Carriers' Act, Pt IV applies in identified circumstances to the carriage of passengers within Australia.

**37** *Paterson v Air Link Pty Ltd* unreported, District Court of New South Wales, 18 May 2001 at 9.

**38** *Paterson v Air Link Pty Ltd* unreported, District Court of New South Wales, 18 May 2001 at 10.

52 *Decision of the Court of Appeal*: The Court of Appeal disagreed. Its reasons were given by Sheller JA. His Honour set out the language of the statement of claim. The only available explanation for the facts pleaded was that they were intended to support causes of action framed in tort and contract. They did not plead the statutory cause of action. Whilst conceding that a reader could derive from the pleading "sufficient to conclude that the plaintiff was to be carried in an aircraft in the course of commercial transport operations", Sheller JA regarded it as significant that there was no recital that Air Link was the "holder of an airline licence" or that the contract in question was one (as further facts disclosed) of interstate carriage[39]:

> "The statement of claim was directed to an action in tort and an action for breach of contract which is the antithesis of a claim based on absolute liability under Pt IV of the [Carriers'] Act."

53 It was inherent in this conclusion that the Court of Appeal was of the view that Mr Paterson's action was "not brought" within two years because that expression had to be read as meaning an "action" sufficiently clearly brought under Pt IV[40]. On the approach taken in *Air Link No 1*, the alternative question of amendment of the statement of claim arose for decision. Following this decision, Mr Paterson applied to the District Court to resolve that question.

Issues for decision on the "action … brought" question

54 *Content of "action" undefined*: Neither the Carriers' Act, nor the Warsaw Convention, contains any definition of what is required for the bringing of an action, so as to escape the consequences of extinguishment provided for in the case of default. The Court of Appeal was correct to conclude that it would not be sufficient for a passenger, making a claim for damages under Pt IV of the Carriers' Act, to commence an action expressed in any terms at all. The "action" must be a claim for damages brought by the passenger or for his benefit and within the specified time. But, otherwise, the content of the "action" is unspecified. It is left to local law and practice.

55 That conclusion is harmonious with the provisions of Art 28.2 of the Warsaw Convention that "[q]uestions of procedure shall be governed by the law of the Court seised of the case". It is also consistent with the terms of Art 29.2, committing the calculation of the period of limitation to such a court. Obviously, neither the Warsaw Convention, nor the Carriers' Act adopting its terms, could

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**39** *Air Link No 1* [2002] NSWCA 85 at [32].

**40** *Air Link No 1* [2002] NSWCA 85 at [33].

deal with every conceivable variation in factual circumstances, including in the constitution of an "action" brought to pursue the right to damages given by law.

56 *Characterisation of the process*: It follows that the essential issue in this part of these proceedings is whether, by the characterisation of the "action" constituted by Mr Paterson's original statement of claim in the District Court, it can be said, with reference to any applicable local law and practice, that an imperfect, defective yet sufficient "action" was brought. Or are the imperfections, defects and insufficiencies of Mr Paterson's pleading such as to deprive the initiating process of the character of "an action", sufficient to satisfy s 34 of the Carriers' Act?

57 Issues, so stated, are unsatisfying. They invoke impressions and judgments upon which minds will inevitably differ. There is no ultimate certainty, because each case will depend upon its own facts, specifically an analysis of the language of the contested pleading to decide whether, read as a whole, it constitutes the initiating document of an "action" that is "brought" under the Carriers' Act or not. It was this very imperfection in the arguments for Mr Paterson (and concern for their implications for cases under the Warsaw Convention and it successors) that led Air Link to press for more precise criteria, such as the Court of Appeal had demanded.

58 The arguments of Air Link on this point are meritorious. For a time, they persuaded me. Out of respect for those who have accepted them[41], I will set out what seem to me to be the best points favouring this approach. I will then explain why I come to the opposite conclusion.

Arguments for a strict meaning of "action … brought"

59 *Pleading of superseded claims is ineffective*: A number of arguments support Air Link's defence of the Court of Appeal's conclusion in *Air Link No 1*. Many of them are derived from Sheller JA's reasons in that Court.

60 Thus, it is clear beyond argument that the pleader in this case did not intend to plead an action based on the Carriers' Act but only one based on the common law of negligence and contract. In this respect, the statement of claim followed familiar language. Yet by federal law (the validity of which is unchallenged), such common law rights had been abolished. Civil liability of air carriers has been substituted, based on substantially different legal principles. Following the Warsaw Convention, common law notions of fault and obligation

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**41** The Court of Appeal in *Air Link No 1* [2002] NSWCA 85 at [7], [9]; Ashley J in *Hatfield* (2001) 183 ALR 674 at 681 [33]. See also *Staples v City and Country Helicopters Pty Ltd* (1994) 119 FLR 291.

have been replaced by strict liability. Moreover, events otherwise giving rise to legal claims are replaced by the need to prove an "accident"[42]. The price of the new legal entitlements is a limitation on the amount of damages that may be recovered from an air carrier[43]. A strict time limit is fixed for the bringing of actions, after which the right to damages is "extinguished"[44].

61 Here, according to Air Link, the "action" brought by Mr Paterson was not one for the only right now given in such circumstances by Australian law, viz that under Pt IV of the Carriers' Act. It was for a superseded right that no longer exists. It was therefore misconceived, unless it could be retrospectively amended and completely re-expressed.

62 *A degree of precision in "actions" is implied*: Where the Federal Parliament has effectively abolished earlier forms of civil liability of air carriers, Air Link argued that courts should not struggle to reinterpret actions clearly framed in terms of superseded law so as to change their character into something they were not intended to be: actions based on the Carriers' Act.

63 Given the time limit and serious consequences of default ("extinguishment"), a degree of precision in the "action" that is brought could be imputed to the Parliament (and the Warsaw Convention) by the requirement stated in s 34. That statement should therefore not be robbed of content.

64 *The recognition of federal jurisdiction*: The importance of clarity in the identification of the "action" (and of recognising that it is based on the Carriers' Act and not the common law) is also demonstrated by the consequences that follow. These include a need for an election between commencement of the proceedings in the Federal Court of Australia or a State court (with their differing procedures and rules) and recognition that the action involved the invocation of federal jurisdiction. Too lax a view as to the necessities of specificity in the content of the "action" rewards those who fail to recognise and express the law governing the case.

65 *Upholding the purposes of accurate pleading*: Whilst some measure of leniency has replaced the former strictness observed in pleading practice[45], the objectives of accurate pleading remain. They include the fair notification to the

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**42** *Povey* (2005) 216 ALR 427 at 453 [111].

**43** Carriers' Act, s 31.

**44** Carriers' Act, s 34.

**45** *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 167-172.

opposite party of the legal character of the claim being brought against it[46]. The defendant should not be obliged, in cases of serious omissions in, or departures from, accuracy in pleading a claim, to guess the nature of that claim and to assume its viability. Those who assert must still prove. If they assert completely misconceived and inapplicable claims, the defendant should not be required to interpret the defective process in a way favourable to the plaintiff, on the hypothesis that it is legally viable. Air Link contested the suggestion that it should assume the responsibility of differentiating substance from surplusage in the originating process and subject the language of that document to a strained construction in order to derive from it the legal foundation needed, when those representing Mr Paterson had failed to specify that foundation.

66 *Avoiding impositions on the recipient of the action*: It may be accepted that specification of the Carriers' Act, or any other statute essential to a viable "action", although good pleading practice, is not an absolute prerequisite to the bringing of an "action" within s 34 of the Carriers' Act[47]. However, Air Link's complaints went far beyond this. Air Link contested the suggestion that an adequate "basket of facts" had been pleaded that permitted characterisation of the "action" "brought" by Mr Paterson as one under Pt IV of the Carriers' Act. Thus, there was no recital of facts that, Air Link argued, were essential to bring an "action" within Pt IV. There was no allegation that Air Link held an "airline licence". There was no allegation that what had happened to Mr Paterson was an "accident", a precondition to recovery not without difficulties as *Povey v Qantas Airways Ltd*[48] demonstrates. Far from there being recitals to characterise the carriage in question as one "between a place in a State and a place in another State", the statement of claim, in its terms, suggested that the carriage was purely intrastate[49].

67 According to Air Link, the problem was therefore not one of surplusage or inadequate description in the facts pleaded but misdescription and misconception that deprived the "action" of the essential character necessary (without substantial amendment impermissible out of time) to enliven rights to damages under the Carriers' Act. According to Air Link, this was not a case where a party had "not quite hit the mark" with its original pleading[50]. It was one involving a fundamental disparity between what had been pleaded and what it was now asserted the "action" truly meant on its face.

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**46** *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th ed (1975) at 17.

**47** *Hatfield* (2001) 183 ALR 674 at 681 [33] per Ashley J.

**48** (2005) 216 ALR 427.

**49** See Carriers' Act, s 27.

**50** *Harris v Raggatt* [1965] VR 779 at 785 per Sholl J.

68 *Respecting characterisation by the court below*: To the extent that s 34 of the Carriers' Act imported appropriate reference to pleading practice and the rules of the court in which the purported "action" had been brought, in order to decide whether in the particular case an "action" had been "brought" as required under Pt IV of the Carriers' Act[51], Air Link suggested that this Court should respect the judgment of the Court of Appeal in evaluating the original statement of claim. When it held that the pleading did not meet the contemporary requirements of court rules and the common law, such an assessment constituted a decision on the standards of the particular court and should be upheld.

69 According to this argument, such standards are proper matters for judgment and the application of the procedural approach of the court "seised of the case"[52]. Although Art 28.2 of the Warsaw Convention was not repeated in Pt IV of the Carriers' Act, the same approach was inherent in the recognition in s 34 that, within Australia, an "action" might be "brought", in pursuit of a person's right to damages, in any Australian court, federal or State, of competent jurisdiction. All such courts have rules, of varying degrees of particularity, governing the initiation of proceedings and the requirements for validly doing so.

70 The adequacy of a particular pleading for this and other purposes is a question commonly considered by courts such as the Court of Appeal[53]. Such courts recognise the difference between provisions in initiating process, drawn with other entitlements in mind but which sufficiently plead a claim of a different character – which should be taken as included – and cases that do not. In the present case the Court of Appeal considered that the original statement of claim fell so far short of an "action" under Pt IV of the Carriers' Act that it should be characterised otherwise. This Court was urged to confirm that assessment and to uphold the Court of Appeal's conclusion on such a matter.

71 To the extent that there was any doubt, Air Link also urged that, the language of s 34 of the Carriers' Act being identical to the limitation in the Warsaw Convention, this Court should follow the trend to strictness in overseas authority on analogous issues concerning the meaning of the Convention.

72 There can be no doubt that the introduction of a strict time limitation was a part of the deliberate compromise that was struck in achieving agreement on

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**51** *Fernance* (1989) 17 NSWLR 710 at 720 per Gleeson CJ.

**52** Warsaw Convention, Art 28.2.

**53** See eg *Wickstead v Browne* (1992) 30 NSWLR 1; *Kirby v Sanderson Motors Pty Ltd* (2002) 54 NSWLR 135.

the Warsaw Convention[54]. During its negotiation, proposals were made that would have allowed exceptions to the two year period in Art 29.1 of the Convention in accordance with the law of the forum court. However, such proposals were not adopted. The only question expressly assigned to the law of the forum in this respect was the strictly limited one, namely how the period of two years was to be calculated[55]. This is why the law of the forum may not be used to interrupt the two year period specified, as for example during infancy or bankruptcy[56]. In this case, the time bar was short, strict and rigid.

73 Although there is no settled jurisprudence of overseas decisions on when an "action" is "brought", Air Link suggested that the context in the Warsaw Convention supported the strict approach taken by the Court of Appeal in its first decision. Where, as in this case, Australian municipal law had provided expressly for a special form of "action" conforming to the Warsaw Convention, the "action" to be "brought" would, at the least, have to be sufficiently clear and specific as to indicate that it was invoking that municipal law. Otherwise, it would not be an "action" of the kind permitted. It would lack the character necessary to an "action". A court would not distort that character simply because an "action" of a different and erroneous kind had been brought within the two year period allowed for an "action" enlivening the special "right … to damages" now alone afforded by Australian law.

74 It will be evident that I regard these arguments as providing substantial reasons for upholding the Court of Appeal's judgment in *Air Link No 1*. In the end, however, I have reached the opposite conclusion. I will explain why.

Conclusion: an "action" was "brought"

75 *International operation: inevitable variations*: The Warsaw Convention, which was the origin of the contested phrase in s 34, contemplated that its

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**54** *Kahn v Trans World Airlines Inc* 443 NYS 2d 79 at 87 (1981); *Fishman v Delta Air Lines Inc* 132 F 3d 138 at 144-145 (2d Cir, 1998).

**55** Warsaw Convention, Art 29.2. For example, whether a year means twelve months or 365 days or whether it includes parts of days: *Kahn* 443 NYS 2d 79 (1981); *Gal v Northern Mountain Helicopters Inc* (1999) 177 DLR (4th) 249.

**56** *Motorola Inc v MSAS Cargo International Inc* 42 F Supp 2d 952 (1998); *Western Digital Corpn v British Airways plc* [2001] QB 733 at 741-742 [14] (CA). But see *Pennington v British Airways* 275 F Supp 2d 601 (2003); cf Shawcross and Beaumont, *Air Law*, 4th ed (2005), vol 1, par VII[448]; Giemulla and Schmid (eds), *Warsaw Convention*, (2003), Art 29, pars 14-18.

provisions would operate throughout the world[57]. Where there is no definition in the Convention (or the Carriers' Act) of the preconditions for the bringing of an action for limitation purposes, it is proper to draw necessary inferences as to how such a provision would operate, given the vastly differing circumstances of municipal courts and tribunals and local law as to initiating process and related practice.

76 Even within Australia, the courts in which federal jurisdiction may be vested vary greatly in the degree of formality required by their initiating pleading and in the detail conventionally observed. In recent years, Australian courts have tended to replace simple uncommunicative process (an ordinary writ), which conveyed no, or no substantial, indication of the nature of the action or claim, with process that identifies the subject matter with a degree of particularity[58]. At the same time, the former strictness that accompanied the older style of pleadings, in courts of pleading, has sometimes given way to a more discursive style. These changes render unsafe reference to some earlier judicial authority. If such disparities and variations exist within the unified Australian judicature, it must be expected that even greater variations will exist in the courts and tribunals of the many states parties to the Warsaw Convention. That is inherent in an international system of such widespread application.

77 In most countries (including Australia) litigants with claims of rights to damages are entitled to represent themselves before courts and tribunals and to bring an action on their own behalf, without legal representation. Many do[59]. It must have been anticipated that the Warsaw Convention would apply to actions brought by such persons. It was certainly contemplated that s 34 of the Carriers' Act, as an Australian statute, would apply to such persons. The contested words were intended to apply to all such cases all over the world. This is a further reason why the Convention phrase (repeated in the Act) must be given a meaning that works sensibly in the vastly different circumstances in which initiating process is drafted by people of different skills, in different legal cultures and in different countries, including Australia. It is a reason for inferring that the contested provision was not intended to have an overly rigid interpretation that would defeat claims for damages, although brought by a formal process within the given period of two years.

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**57** Reasons of Callinan J at [124]; *Agtrack (NT) Pty Ltd v Hatfield* [2005] HCA 38 at [75].

**58** *J L Holdings* (1997) 189 CLR 146 at 168. Contrast *Common Law Procedure Act* 1899 (NSW), s 4 and Supreme Court Rules 1970 (NSW), Pt 7 r 1, Sched F, Form 1.

**59** Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, (2000) at 359-360 [5.147].

78 *Adopting a purposive interpretation*: In giving effect to the language of the Warsaw Convention, as enacted in terms of s 34 of the Carriers' Act, it is proper to do so, in default of express provisions defining the procedures by which an "action" may be "brought", in a way that assists the achievement of the purposes of the Convention.

79 A purposive approach to the construction of legislation (such as the Carriers' Act, including s 34) is now mandated in Australia by federal law[60]. Moreover, it is repeatedly observed in the common law and in the decisions of this Court[61]. However, some of the earliest, and strongest, statements about purposive interpretation in common law courts appeared in the elaboration of the Warsaw Convention itself. Thus in *Fothergill v Monarch Airlines Ltd*[62], Lord Diplock in the House of Lords explained:

> "The language of that Convention that has been adopted at the international conference to express the common intention of the majority of the states represented there is meant to be understood in the same sense by the courts of all those states which ratify or accede to the Convention. Their national styles of legislative draftsmanship will vary considerably as between one another. So will the approach of their judiciaries to the interpretation of written laws and to the extent to which recourse may be had to travaux préparatoires, doctrine and jurisprudence as extraneous aids to the interpretation of the legislative text.
>
> The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*[63],

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**60** *Acts Interpretation Act* 1901 (Cth), s 15AA. See also s 15AB.

**61** *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 111-113; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78].

**62** [1981] AC 251 at 281-282; *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628 at 633 [5], 634 [7], 677-679 [146]-[150]. See also *Povey* (2005) 216 ALR 427 at 456-457 [131].

**63** [1978] AC 141 at 152.

'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.'"

80 The special need, in the case of the Warsaw Convention, to consider two texts, the French and the English, has added to difficulties of construction, rendering a purposive approach the appropriate and safe course to adopt[64].

81 When this approach is taken to the requirement in Art 29.1 of the Warsaw Convention (repeated with no relevant differentiation in s 34 of the Carriers' Act), a purposive approach encourages a court, construing the provision, to ask why it was so expressed. In particular, why is it stated in such drastic terms, contemplating the extinguishment of the "right ... to damages" where such right had not been claimed in the form of an "action … brought by him or for his benefit" within the relatively short time interval nominated?

82 The answer, previously identified, is that this was part of the compromise hammered out in international negotiations. The participants included wealthy and poor countries; countries already with substantial civil aviation and those without; countries concerned about the rights of plaintiffs who had experienced difficulty in proving the cause of air mishaps and establishing conventional requirements of fault and obligation; and countries with governmental air carriers concerned about the extent of their potential liability and keen to be in a position to identify that liability so that they could provide, where desired, for insurance and reinsurance cover[65].

83 If these considerations afford the touchstone for interpreting the phrase "if an action is not brought" in this context, it is tolerably clear that the purpose of that precondition is the need to ensure a formal invocation by the person claiming the right to damages of the jurisdiction of a court or tribunal; the identification by that person in the initiating process of a claim to a "right ... to damages"; the nomination of the claim as one arising out of "carriage" on an "aircraft"; and the commencement of the proceedings "within two years" of the specified aircraft carriage. If the foregoing elements are present, the terms of Art 29.1 of the Warsaw Convention and of s 34 of the Carriers' Act are fulfilled. In that case, the drastic consequence of default, namely entire extinguishment of the right to damages, does not arise.

84 Tested by these standards, the action brought by Mr Paterson in the District Court conformed to the statutory (and Convention) language. In effect,

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**64** *Fothergill* [1981] AC 251 at 272 per Lord Wilberforce. See also *South Pacific Air Motive* (1998) 87 FCR 301 at 333-334.

**65** *Povey* (2005) 216 ALR 427 at 456 [129].

the error of the Court of Appeal, in concluding otherwise, was the result of failing to give the language of s 34 a purposive construction. Particularly so when its origin, and operation, within the Warsaw Convention language is to be considered, in all of its differing applications in different countries by different decision-makers.

85 *The determinant of federal law*: The foregoing does not mean that any "action" at all, brought within the interval of two years, would satisfy the Convention and statutory language and save the person with a claim to damages from extinguishment of that right. The process must still qualify as an "action", relevantly one under the Carriers' Act. However, it is important to recognise that, in Australia, the right to damages is one conferred by federal law.

86 Compliance, or non-compliance, with State laws as to procedure and pleading will be relevant in deciding whether the initiating proceeding may be characterised as an "action" falling within s 34 of the Carriers' Act. But the State laws are not themselves determinative of the entitlement. Similarly, disentitlement, by way of extinguishment of a right to damages, must be sourced to federal law (not State procedural or pleading law as such). It is for these reasons that, ultimately, the question to be answered is a question of federal law, not one about compliance, or non-compliance, with State pleading law or rules of court. The question is whether "an action is not brought" under Pt IV of the Carriers' Act as that phrase is intended to operate for its purpose, relevantly, in s 34 of that Act.

87 A specific reason why State laws as to procedure and pleading cannot control the meaning of the expression "action is not brought" in s 34 of the Carriers' Act is that the Act, as a federal statute, is expressed to operate throughout Australia. Indeed, by adopting in Pt IV the language of the Warsaw Convention, it is designed to introduce uniform international notions both for the entitlement to damages in respect of accidents in air carriage and as to the extinguishment of that entitlement. By invoking the jurisdiction of differing courts, persons claiming the right to damages in Australia will secure procedural and other entitlements and be subject to various requirements. However, these cannot alter the essential elements of an "action" that qualifies under s 34.

88 In the application of State law and court rules other consequences might follow for the pleading of a claim and the adequacy of initiating process. But, for the question presented here, the legal criterion is afforded by the Carriers' Act, s 34, a federal law, and, to the extent that it incorporates the same language, the Warsaw Convention and the meaning given to it. With respect, these federal and international considerations were not given proper attention in the courts below.

89 *The action identified the claim's essentials*: When the foregoing elements are introduced into the assessment of whether Mr Paterson's statement of claim sufficiently answers to an "action … brought by him" within the time specified

by s 34 of the Carriers' Act, the answer given differs from that reached by the Court of Appeal in *Air Link No 1*.

90 True, the pleading of the statement of claim is inadequate by orthodox pleading standards and, perhaps, by State court rules and practice. However, these cannot determine the character of the "action" for present purposes. Certainly, the "action" claims a right to damages. It is brought by Mr Paterson who is identified as an air passenger. It concerns carriage by an aircraft. It specifies the date of the carriage. It sufficiently nominates the circumstances of an event that is clearly capable of description as an "accident". It makes it clear that the carriage was in the course of "commercial transport operations" which, in Australia, requires the carrier to be the holder of an airline licence or a charter licence.

91 The notion that, receiving the statement of claim, Air Link was in any way surprised or misled by Mr Paterson's action is fanciful. On the contrary, Air Link's notice of grounds of defence specifically pleaded that it was the holder of an air operator's certificate in force under the *Civil Aviation Act* 1988 (Cth) and that the aircraft, carrying Mr Paterson, was operated by it "for reward for the carriage of passengers" as part of a journey in a ticket issued by another carrier for interstate carriage and was subject to Pt IV of the Carriers' Act.

92 Obviously there were mistakes and inadequacies in the facts pleaded in the statement of claim. But the character of Mr Paterson's action was clear enough. To plead it correctly under Pt IV of the Carriers' Act, no new ideas were required. Clearly, it would have been preferable for the pleading to have addressed the Carriers' Act and its terms. However, the fundamental purpose of pleading is to state the essential facts that notify the opposite party of the claims being made. It is not normally essential to plead the applicable law[66].

93 Measured against the language and purpose of s 34 of the Carriers' Act (and Art 29.1 of the Warsaw Convention), the process begun in the District Court within the two year interval was an "action" that was "brought" within time. The opposite conclusion was erroneous.

94 *Conclusion: correction required*: Whilst I agree that this Court will normally respect conclusions of the Court of Appeal on questions of practice and procedure, including pleading, we are relieved of any obligation to do so in this case. This is because that Court failed to give adequate weight to the federal character of the right of action applicable to the case, the federal specification of the conditions for extinguishment of that right and the proper approach to

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**66** *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 472-473; *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 245.

ascertaining the meaning of those provisions, especially given the source of s 34 in the text of Art 29.1 of the Warsaw Convention.

95 This is the reasoning that brings me, on the first issue, to the same conclusion as that reached by the other members of this Court.

"THE RIGHT … IS EXTINGUISHED"

Consequential decisions below

96 The foregoing conclusion means that the primary judge was correct in deciding that Mr Paterson's imperfectly pleaded statement of claim nonetheless amounted to an "action" that was "brought" by him within two years of the date of the arrival of the aircraft. It thus means that the right of Mr Paterson to damages under Pt IV of the Carriers' Act was sufficiently placed before the District Court by the action that he brought. In accordance with federal law, it fell to be decided by that Court, vested for that purpose with federal jurisdiction.

97 In consequence of this conclusion, the action being brought within the specified time, Mr Paterson's right to damages was not "extinguished". To the extent that it was not extinguished, questions as to the amendment of the statement of claim, to add a new and different cause of action, purportedly with relation back to the date when the statement of claim was first filed[67], do not arise.

98 It is true that, in order to clarify the valid "action" that has been "brought" by Mr Paterson, some amendments of the statement of claim may be needed. Such amendments present an entirely different question from that considered by the second judge of the District Court (Graham DCJ)[68] and by the Court of Appeal in *Air Link No 2*[69]. Those decisions proceeded on the footing, established by the Court of Appeal's holding in *Air Link No 1*, that Mr Paterson's original statement of claim was "an action … not brought by him … within two years after the date of arrival of the aircraft" within s 34 and hence that his right of action had been "extinguished". The decision of this Court now holds that this premise for the reasoning in *Air Link No 2* was incorrect. No question of the extinguishment of Mr Paterson's right to damages arises.

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**67** *Baldry v Jackson* [1976] 2 NSWLR 415 at 419. But see *Liff v Peasley* [1980] 1 WLR 781 at 802-803; [1980] 1 All ER 623 at 641-642; *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 200.

**68** *Paterson v Air Link Pty Ltd* unreported, District Court of New South Wales, 16 May 2002.

**69** (2003) 58 NSWLR 388.

Resulting correction of the record

99 In one sense, it is unnecessary, and thus undesirable, to consider at any length the decision of the Court of Appeal in *Air Link No 2*, for which special leave was earlier provided. This is because anything now said in that matter amounts to *obiter dicta*. The premise for its resolution has been removed. All that remains is a consequential correction of the record in the light of the decision in *Air Link No 1*. If Mr Paterson's action is not "extinguished" by s 34 of the Carriers' Act, no occasion arises to decide whether, if that had been so, it would have been competent for the District Court to permit the amendment of the original statement of claim to add a new cause of action based on the Carriers' Act. Inherent in this Court's earlier reasoning is a conclusion that such a cause of action was adequately stated in the "action" that Mr Paterson "brought".

The finality of "extinguishment"

100 Nevertheless, as other members of this Court in these proceedings, and in the associated appeal in *Agtrack*[70], have expressed conclusions about the finality of extinguishment effected by the Carriers' Act, and the inadmissibility of State law (or State court rules) to subvert that finality[71], it is appropriate for me to say that I agree in their conclusion.

101 Having regard to the source of the word "extinguished" and its purposes as revealed by the *travaux préparatoires* for the Warsaw Convention, Art 29.1; the object of that provision to secure the compromise there agreed; the virtually unanimous interpretation of international decisions and commentators[72]; and the convincing opinions on the point in the South Australian Full Court[73], there are overwhelming reasons for holding that "extinguished" in s 34 of the Carriers' Act means exactly what it says. Where the action is not brought within the two year period, the right to damages, which might otherwise arise under Pt IV of the Carriers' Act, is "extinguished, dead and gone forever"[74].

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**70** *Agtrack* [2005] HCA 38 at [45]-[54] in the joint reasons and at [108] in the reasons of Callinan J.

**71** See reasons of Callinan J at [149]. See also in *Agtrack* [2005] HCA 38 at [60] in the joint reasons.

**72** *Kahn* 443 NYS 2d 79 at 87 (1981); Shawcross and Beaumont, *Air Law*, 4th ed (2005), vol 1, par VII[443].

**73** *Timeny v British Airways plc* (1991) 56 SASR 287.

**74** (1991) 56 SASR 287 at 301 per Bollen J (Cox J agreeing). See *Air Link No 2* (2003) 58 NSWLR 388 at 437 [233] per Ipp JA.

102 In the face of federal law having such a meaning, no State law (including a rule of court permitting amendment of pleadings) could validly operate to contradict the federal provision and resuscitate the extinguished action. Any such State law would not be "picked up" by s 79 of the *Judiciary Act* 1903 (Cth)[75]. Alternatively, before the commencement of such proceedings, s 109 of the Constitution would operate to invalidate a State law to the extent, if at all, that it purported to apply to the case in terms inconsistent with s 34 of the Carriers' Act[76].

103 It follows that, on the premise upon which it was obliged to act, the Court of Appeal in *Air Link No 2* erred in its reasoning. The dissenting opinion of Ipp JA is to be preferred.

104 However, the true foundation for the disposition of the appeal in *Air Link No 2* is otherwise. The orders in that appeal follow from the conclusion of this Court in *Air Link No 1* that Mr Paterson's action was brought within the time specified by s 34 of the Carriers' Act and thus was not "extinguished". It is competent for the District Court to allow any amendment of the pleading in the "action" that it would otherwise permit in any other viable claim to damages, uninhibited by federal extinguishment of that claim.

ORDERS

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

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**75** See *Agtrack* [2005] HCA 38 at [59]-[60].

**76** See *Agtrack* [2005] HCA 38 at [61].

106 CALLINAN J. This case was argued at the same time as *Agtrack (NT) Pty Ltd v Hatfield*[77] because both cases raised essentially the same point. The reasons in them should therefore be read together. There is yet to be a trial in the matter, the facts and proceedings in which I will shortly summarize. The question which they raise is whether the respondent's action is statute barred.

107 On 25 September 1998, the respondent was injured as he disembarked from the appellant's aeroplane at Dubbo in New South Wales following a flight from Cobar in the same State. That flight, as the appellant pleaded in its defence, was a segment of a journey from an airport in Queensland on a ticket issued by Qantas Airways Limited, a major airline operator in Australia and overseas. It was therefore a journey in the course of interstate travel under a contract of carriage, relevantly governed by Pt IV of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Act"). The respondent alleges that his injuries were caused by the negligent placement by the appellant of a moveable staircase extending from the aircraft to the tarmac.

108 As appears from the pleadings, the appellant is the operator of an airline under a licence issued pursuant to the *Air Transport Act* 1964 (NSW).

109 On 22 September 2000, the respondent brought an action against the appellant in the District Court of New South Wales, claiming damages in negligence and contract. The respondent's initiating process was filed shortly before the expiration of two years after the respondent's journey, the limitation period imposed by s 34 of the Act.

110 The respondent's pleading made these allegations:

> "2. At all material times, the Defendant was authorised under the *Air Transport Act* 1964 to operate a commuter and charter airline in New South Wales.
>
> 3. On or about 25 September 1998, the Plaintiff was a passenger on the Defendant's flight number 648 from Cobar to Dubbo.
>
> 4. When alighting from the Defendant's aircraft at Dubbo Airport, at about 4.00 pm, on or about 25 September 1998, the Plaintiff stepped on to a set of stairs at the bottom of the stairway of the Defendant's aircraft. The set of stairs was not properly and safely positioned and turned over underneath the Plaintiff, causing him to fall onto the ground, as a consequence of which he suffered injuries loss and damage.

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**77** [2005] HCA 38.

5. The injuries loss and damage sustained by the Plaintiff were as a result of the negligence and/or breach of duty of care of the Defendant by its servants or agents ...

8. Further, and or in the alternative, on or about 20 September 1998, the Plaintiff purchased from the Defendant, through its agent, Qantas Airways Limited, ticket number 4463500449, including for the Defendant's flight 648 from Cobar to Dubbo on 25 September 1998.

9. It was an implied term of the agreement between the Plaintiff and the Defendant that the Defendant would transport the Plaintiff in its aircraft in a safe and proper manner.

10. In breach of the term of the agreement, the Defendant did not transfer the Plaintiff in a safe and proper manner, and the Plaintiff relies upon the particulars set out in paragraphs 3-10 inclusive of this Statement of Claim.

11. As a result of the breach by the Defendant of the term of the agreement, the Plaintiff has sustained injuries loss and damage as particularised in this Statement of Claim, and in his Particulars Pursuant to Part 9 Rule 27."

111 In its defence, the appellant alleged the following:

"10. The Plaintiff travelled on the aircraft operated by the Defendant between Cobar and Dubbo on 25 September 1995 pursuant to a ticket issued by Qantas Airways Ltd for carriage from Gold Coast to Cobar and return.

...

11. The carriage of the Plaintiff between Gold Coast and Cobar and return was regarded by the parties as a single operation agreed upon by a single contract evidenced by the said ticket.

12. The carriage of the Plaintiff by the Defendant between Cobar and Dubbo was carriage on an aircraft operated by the holder of an air operator's certificate authorising airline and charter operations in the course of commercial transport operations pursuant to a contract for the carriage of the Plaintiff from a place in Queensland to a place in New South Wales and subject to Part IV of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth).

13. The liability of a carrier under Part IV of the *Civil Aviation (Carriers' Liability) Act* 1959 in respect of the Plaintiff's alleged

injuries is in substitution for any civil liability of the carrier under any other law in respect of the alleged injuries.

14. In the premises the proceeding pleaded in the Statement of Claim is not maintainable and is liable to be dismissed."

112 Subsequently, after the limitations period had expired, the respondent sought leave to amend his statement of claim by withdrawing his claims in tort and contract and substituting for them, a claim based exclusively on Pt IV of the Act. Both parties agreed that the appellant's pleading, to the extent quoted, was factually and legally correct, that Pt IV of the Act did apply to the respondent, and defined the appellant's sole obligations and liability to him. Leave to amend accordingly was granted by the District Court (Judge Graham) on 16 May 2002. The nature and result of an earlier application[78] by the appellant are fully dealt with in the reasons of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ.

The Court of Appeal of New South Wales

113 The appellant appealed against the decision of Graham DCJ. The respondent submitted that Pt 17 r 4 of the District Court Rules 1973 (NSW) ("the Rules") contemplated and allowed amendment out of time, and that r 4 had been picked up and applied by s 79 of the *Judiciary Act* 1903 (Cth).

114 On 11 September 2003, the Court of Appeal (Mason P and Beazley JA, Ipp JA dissenting) dismissed the appeal[79]. The majority held that r 4 was both validly made and applicable to substantive limitation periods. Their Honours further found that the rule retained its procedural character despite its intrusion into an area of substantive law. The majority also held that r 4 was picked up and applied as a surrogate federal law by virtue of s 79 of the *Judiciary Act*. They were of the opinion that s 79 could pick up substantive State laws, even those relating to limitations, assuming that they were not inconsistent with a relevant federal enactment. In this case the majority thought that s 34 of the Act and r 4 operated in different spheres: the former dealt with time limits for bringing actions; r 4 was concerned with pleadings and their amendment.

115 The view of Ipp JA was that the respondent's amendments reached beyond the scope of r 4. This was so because the respondent sought to plead new facts rather than revising facts already pleaded. His Honour was also of the view that r 4 could be valid only if it were confined to procedural limitation provisions. It could not operate to permit the introduction of new causes of action which had otherwise been extinguished by lapse of time. His Honour thought that rules

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**78** *Air Link Pty Ltd v Paterson* [2002] NSWCA 85.

**79** *Air Link Pty Ltd v Paterson (No 2)* (2003) 58 NSWLR 388.

which purportedly allowed the courts to extend limitation periods, by relating claims back to the date that proceedings (absent those claims) were commenced were not merely procedural: this was so because they substantially extended the limitation periods beyond their expiry date. Ipp JA was also of the opinion that r 4 could not be picked up as a federal law by the *Judiciary Act* because it would be in conflict with the Act and would therefore attract the operation of s 109 of the Constitution.

Appeal to this Court

116 In this Court the appellant substantially adopted the reasoning of Ipp JA in the Court of Appeal. It argued that compliance with s 34 of the Act was a condition precedent to the exclusive right to sue for damages given to the respondent by Pt IV of the Act: the respondent's failure to comply with it was incurable either by the Rules or otherwise.

117 The appellant submitted that the filing of the respondent's statement of claim did not amount to an "action ... brought" by the respondent within the meaning of s 34 of the Act: the effect of that section was to extinguish the respondent's cause of action two years after the date of the accident.

118 The respondent submitted that Pt 17 r 4(1), (5) and (5A) of the Rules have the effect of deeming his amended statement of claim, filed on 30 May 2002, to have been filed on 22 September 2000. In consequence, the respondent contended, he had brought action within two years as required by s 34 of the Act.

Statutory provisions

119 It is necessary to set out the relevant sections of the Act. Section 27 provides:

> "**Application of Part**
>
> **27** ...
>
> **(3)** 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.
>
> ..."

120 The respondent's journey, and each segment of it were accordingly interstate travel by air and therefore subject to the Act. Disembarkation from an

aircraft forms part of a relevant journey pursuant to s 28 of the Act which provides as follows:

"**Liability of the carrier for death or injury**

**28** 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 31 which is as follows (together with s 36) makes provision for a remedy under the Act in lieu of any remedies that might otherwise be available under State or federal law.

"**Limitation of liability**

**31(1)** Subject to the regulations relating to passenger tickets, the liability of a carrier under this Part in respect of each passenger, by reason of his injury or death resulting from an accident, is limited to:

(a) where neither paragraph (b) nor paragraph (c) applies – $100,000;

(b) where, at the date of the accident, a regulation was in force prescribing an amount higher than $100,000 for the purposes of this subsection but paragraph (c) does not apply – the amount prescribed by that regulation; or

(c) where an amount that exceeds:

(i) if, at the date of the accident, no regulation was in force as mentioned in paragraph (b) – $100,000; or

(ii) if, at the date of the accident, a regulation prescribing an amount was in force as mentioned in paragraph (b) – the amount prescribed by that regulation;

is specified, in the contract of carriage pursuant to which the passenger was carried, as the limit of the carrier's liability – the amount so specified.

..."

Section 34 sets out the limitation period and provides as follows:

"**Limitation of actions**

**34** 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."

Section 36 provides:

"**Liability in respect of injury**

**36** Subject to the next succeeding section, the liability of a carrier under this Part in respect of personal injury suffered by a passenger, not being injury that has resulted in the death of the passenger, is in substitution for any civil liability of the carrier under any other law in respect of the injury."

121 For completeness it should be noted that Pt IV of the Act is directly applied to intrastate travel by the *Civil Aviation (Carriers' Liability) Act* 1967 (NSW), but it is the former directly, and not the latter which is applicable here by reason of s 27 of the Act.

122 Part 17 r 4 of the Rules effectively changes the relevant common law and provides:

"**4 Statutes of limitation**

(1) Where any relevant period of limitation expires after the date of filing of a statement of claim and after that expiry an application is made under rule 1 for leave to amend the statement of claim by making the amendment mentioned in any of subrules (3), (4) and (5), the Court may in the circumstances mentioned in that subrule make an order giving leave accordingly, notwithstanding that that period has expired.

...

(4) Where, on or after the date of filing a statement of claim, the plaintiff is or becomes entitled to sue in any capacity, the Court

may order that the plaintiff have leave to make an amendment having the effect that he sues in that capacity.

(5) Where a plaintiff, in his statement of claim, makes a claim for relief on a cause of action arising out of any facts, the Court may order that he have leave to make an amendment having the effect of adding or substituting a new cause of action arising out of the same or substantially the same facts and a claim for relief on that new cause of action.

(5A) An amendment made pursuant to an order made under this rule shall, unless the Court otherwise orders, relate back to the date of filing of the statement of claim.

(6) This rule does not limit the powers of the Court under rule 1."

Reference should also be made to rr 3, 5 and 7 of Pt 9 of the Rules which are concerned with the contents of originating processes in the District Court.

"**3 Facts, not evidence**

(1) A pleading of a party shall contain, and contain only, a statement in a summary form of the material facts on which he relies, but not the evidence by which those facts are to be proved.

(2) Subrule (1) has effect subject to this Part and to Part 5.

...

**5 Documents and spoken words**

Where any document is, or spoken words are, referred to in a pleading:

(a) the effect of the document or of the spoken words shall, so far as material, be stated, and

(b) the precise terms of the document or spoken words shall not be stated, except so far as those terms are themselves material.

...

**7 Conditions precedent**

Where it is a condition precedent necessary for the case of a party in any pleading that:

(a) a thing has been done,

(b) an event has happened,

(c) a state of affairs exists, or existed at some time or times,

(d) the party is and has been at all material times ready and willing to perform an obligation, or

(e) the party was at all material times ready and willing to perform an obligation,

a statement that:

(f) the thing has been done,

(g) the event has happened,

(h) the state of affairs exists, or existed at that time or those times,

(i) the party is and has been at all material times ready and willing to perform the obligation, or

(j) the party was at all material times ready and willing to perform the obligation,

shall be implied in the pleading."

Appellant's arguments

123 The appellant puts its arguments with respect to the Act in various ways.

124 The Act was enacted pursuant to the Warsaw Convention of 1929 as amended from time to time. The Convention established a "uniform international code" for the liability of carriers for injury or death during carriage between countries party to the Convention. It made a compromise between the interests of air carriers and passengers. It took account of the difficulties of proof confronting plaintiffs. It presumed liability of air carriers for injury or death. Carriers could not contract out of it. In return, it relevantly capped damages and extinguished the right to sue for damages after two years. As an international instrument, or perhaps more correctly, an enactment pursuant to such an instrument, it should be construed consistently universally[80]. In particular "is

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**80** *Sidhu v British Airways plc* [1997] AC 430 at 453; *El Al Israel Airlines Ltd v Tsui Yuan Tseng* 525 US 155 at 175-176 (1999); *Emery Air Freight Corporation v*

(Footnote continues on next page)

extinguished" in s 34 should be read as meaning exactly that, beyond resuscitation by local rules of court or otherwise. So much may be accepted but does not meet the real point of the case.

125 Although the Act incorporates the regime of the Warsaw Convention in Australian law and applies it to air carriage within Commonwealth constitutional power, it does so in various ways. In Pts II and III it is done by reference to a Scheduled English text, to be read with, and subject to express provisions in the relevant Part. In Pt IV it is done by express provisions using the language of the Convention but with modifications. In Pt IIIC it is done by reference to a Scheduled English text, by reference to provisions in Pt IV, and subject to some other express provisions in the Part.

126 Article 28 of the Warsaw Convention identifies the jurisdictions in which proceedings may be brought and further provides as follows:

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

Even so, the appellant submits, procedures, or local rules relating to them, cannot detract from the clear language of s 34 of the Act which is to the same effect as Art 29.1 which provides as follows:

> "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."

127 The appellant's principal submissions may be summarized in this way. Procedural rules of the *lex fori* may not be used to falsify, or toll the limitation period, for example, during infancy or bankruptcy, or retrospectively by amendment. The sole Australian decision[81] on Art 29 of the Convention which concerned an extension of time to bring an action, is consistent with the decisions of the United States, the United Kingdom, Canada and New Zealand. Notwithstanding differences in procedural provisions, all of the decisions on Art 29 have a common ratio. The majority in the Court of Appeal erred in purporting to distinguish them on the ground that they did not deal with a rule relating to amendment.

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*Nerine Nurseries Ltd* [1997] 3 NZLR 723 at 728; *Gal v Northern Mountain Helicopters Inc* (1999) 177 DLR (4th) 249.

**81** *Timeny v British Airways plc* (1991) 56 SASR 287.

128 The balance of the appellant's submissions are concerned with the meaning and effect of the Rules, whether they can be and are picked up by s 79[82] of the *Judiciary Act*, whether there is a conflict between them and the Act, and the application of s 109[83] of the Constitution to such a conflict. The relevant Rules, if they do, as appears to be the case, allow the making of the relevant amendment out of time, are in conflict with the Act. State laws cannot be applied by s 79 to circumstances in which their direct operation would be invalidated for inconsistency with an existing law of the Commonwealth. Nor can s 79 authorize a court exercising federal jurisdiction to give an altered meaning to a State law.

129 There is one further argument of the appellant: that if Pt 17 r 4 has the operation the majority in the Court of Appeal held it does, it is ultra vires the rule-making power. Section 161 of the *District Court Act* 1973 (NSW) contains the rule-making power and is directed essentially to matters of practice and procedure. Part 17 of the Rules is concerned with amendment, and r 4, which permits amendment, after expiry of a limitation period, of a proceeding commenced within the limitation period, is for present purposes in the same form as Pt 20 r 4 of the Supreme Court Rules of New South Wales. There is no equivalent, however, in the *District Court Act* of s 6 of the *Supreme Court Act* 1970 (NSW) which provides that the Supreme Court Rules will prevail over any prior Act inconsistent with them. The principle of statutory construction that requires clear intent to abrogate substantive legal rights applies to delegated legislation. The substantive effect of Pt 17 r 4 is not a mere incident of some other, purely procedural, purpose. As observed by Ipp JA, the clearly stated purpose of the rule is to empower the Court, in its discretion, to defeat statutory limitation periods.

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**82** Section 79 of the *Judiciary Act* 1903 (Cth) provides:

> "**State or Territory laws to govern where applicable**
>
> 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."

**83** Section 109 of the Constitution provides:

> "**Inconsistency of laws**
>
> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

130 When Pt 17 r 4 was promulgated, most limitation provisions were still regarded as procedural bars to the remedy. That distinction informed the rules of the High Court of England and Wales from which Pt 17 r 4 and its equivalents were derived, and still informs that approach to the identification of the time or event when amendments under rules of court can, and when they cannot, relate back so as to overcome statutory limitation periods. In Australia however, *John Pfeiffer Pty Ltd v Rogerson*[84] has now established that all limitation periods are substantive. One consequence has been to redirect attention to the need for adequate statutory backing for rules of court directed to overcoming limitation periods, and to the lack of adequate backing for Pt 17 r 4.

131 Ipp JA was therefore correct in holding that Pt 17 r 4 is ultra vires the rule-making power in the *District Court Act*.

Disposition of the appeal

132 For a number of reasons which will appear, it is unnecessary to deal with all of the appellant's arguments. The first is that when attention is directed to the language of the Act it can be seen that the resolution of the case depends upon the posing and answering of somewhat different questions from those upon which the parties and the courts below tended to focus in this matter. The first question is whether the respondent brought his action within two years after the aircraft upon which he travelled arrived at its destination. The second inquiry is whether the respondent's initiating document, the statement of claim, in the form that it first took, constituted the bringing of an action within the time specified by s 34 of the Act.

133 In considering these questions it is relevant to keep in mind that an action *under* the Act is exactly that. It is not an action for *breach* of the Act.

134 I have decided that the respondent, by filing the statement of claim in the District Court of New South Wales, did bring an action under the Act within the limitation period prescribed by s 34.

135 Whilst it may readily be acknowledged that a degree of precision and particularity in pleading is highly desirable, and may, in some circumstances be essential, and that reference in terms to the Act in the respondent's pleading would have been better, I do not consider that its omission is fatal to the respondent's claim. These are my reasons for this conclusion.

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**84** (2000) 203 CLR 503.

136 The words of the Act are very broad. They require no more than the bringing of an action. Albeit that the travel was travel to which the Act applied, and accordingly action in respect of it would call for a decision in federal jurisdiction, regardless of the locality or designation of the court exercising it, the action has to be able to be seen to be one which has been validly launched in the court the jurisdiction of which the claimant actually seeks to invoke.

137 Part 1 r 4 of the Rules does not define an action. It does however define an originating process, in simple terms, by reference to the lodging of a document:

> "***originating process***, in relation to any proceedings, means the document by the lodging of which the proceedings are commenced in the Court in its civil jurisdiction."

138 Provision is made for relief against failure to comply with the Rules, either before or after the occasion for compliance arises[85].

139 Division 2 of Pt 5 of the Rules is headed "Manner of commencement of actions". It requires, by r 6, the lodging with the registrar of a statement of claim. Special provision is made for the filing of material to accompany a claim for damages made in respect of personal injuries. There is no issue concerning that here.

140 The statement of claim was not relevantly deficient by reason of the absence from it of a reference to any of the terms of the contract (the ticket) between the respondent and the appellant's agent, Qantas Airways Limited. Rule 5 of Pt 9 requires, where a document is referred to in a pleading, only that its effect, so far as material, and not its precise terms except so far as they are themselves material, be stated. The points of origin and conclusion of the respondent's total journey have nothing material here to say about the terms or the effect of the respondent's contract. The only light that they would shed on the respondent's claim would be to indicate the nature of the jurisdiction, federal or State, exercisable in determining it. But whether that is indicated or not does not determine what the jurisdiction exercisable is. It is federal jurisdiction whether the parties ultimately apprehend that to be so or not.

141 The principal purpose of particularity in a statement of claim is to tell the other party the identity of the plaintiff, that he seeks to hold the defendant liable in damages, the facts relied on as giving rise to the claim, and generally the nature of the case against the defendant. Surplusage can be ignored or struck out. Misdescription of the cause of action to which the facts pleaded give rise is easily

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**85** Part 1 r 5 of the District Court Rules.

susceptible of correction. I do not see why, in assessing the sufficiency of a statement of claim for the purposes of the Act, and therefore, in this case, in considering the question whether an action has been brought, reference may not be made both to the matters to which I have referred, and the absence or otherwise of prejudice to a defendant which must have known that the respondent could sue, only either under the Act, or the State Act, which relevantly applied the former, the practical consequences of either being exactly the same.

142 In that regard a sharp distinction can be drawn between the facts of the case and the facts of *Weldon v Neal*[86] which established the important principle that amendments are not admissible when they prejudice the rights of the opposite party, as existing at the date of the amendments, and that significant prejudice would obviously arise when the allowance of the amendment would deny the defendant a defence of limitations. There, the plaintiff sought to set up, in addition to her claim for slander brought within the limitation period, claims far outside it, for assault, false imprisonment, and other causes of action. None of these could possibly be maintained on the same facts as might found a claim for slander. New material facts obviously would have to be pleaded. Even though that is not strictly the issue here, new facts did not have to be pleaded to validate the respondent's statement of claim as a sufficient originating process.

143 All that was required to found an action under the Act was pleaded here before the amendment was sought to be made: the flight, the date, the event, that is, the accident, the plaintiff, the defendant, and the ticket under which he was travelling. It is true that recourse to further particularity of the ticket, the contract, of which the appellant at all material times had knowledge, and which it subsequently pleaded in its defence, showed that the Act, rather than the *Civil Aviation (Carriers' Liability) Act* 1967 (NSW) applied (the practical consequences of which were the same), and that the action was in federal jurisdiction. Some analogies may be drawn. It is hardly likely that a person who alleged a breach of contract in a statement of claim filed within time would be held to have failed to have brought an action within the limitation period if, after its expiration, for the first time he identified the term in respect of which he claimed the defendant to be in breach. So too, it is well established[87] that a person can rely upon an after-discovered breach of contract, quite different from one whether established or not, earlier relied on or pleaded.

144 A sufficient statement of claim was filed in time here and accordingly the respondent's action was brought within time.

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**86** (1887) 19 QBD 394.

**87** *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359.

145 It follows that I do not regard the absence in this case of a reference to the Act in the statement of claim as a fatal defect denying that the action had been brought within the limitation period (see r 6 of Pt 5 of the Rules). This is so because of the special nature of the action here, which is, as I would emphasize, an action of the only kind that can be brought on the facts pleaded, and one which cannot easily be labelled, as can be an action in tort, or contract. It is true that lawyers usually tend to think of a cause of action as the label to be given to the category of claims within which the claim in question on the facts alleged in the case falls. But "cause of action" does not have that meaning exclusively. The phrase is often used in relation to the facts giving rise to a right of action. As Parke B said in *Hernaman v Smith*[88]:

> "The term 'cause of action' means all those things necessary to give a right of action, whether they are to be done by the plaintiff or a third person."

Another statement to a similar effect is as follows[89]:

> "'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse."

Wilson J said this in *Do Carmo v Ford Excavations Pty Ltd*[90]:

> "The concept of a 'cause of action' would seem to be clear. It is simply the fact or combination of facts which gives rise to a right to sue. In an action for negligence, it consists of the wrongful act or omission and the consequent damage[91]. Knowledge of the legal implications of the known facts is not an additional fact which forms part of a cause of action. Indeed, a person may be well appraised of all of the facts which need to be proved to establish a cause of action but for want of taking legal advice may not know that those facts give rise to a right to relief."

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**88** (1855) 10 Exch 659 at 666 [156 ER 603 at 606].

**89** *Cooke v Gill* (1873) LR 8 CP 107 at 116 per Brett J.

**90** (1984) 154 CLR 234 at 245.

**91** cf *Cooke v Gill* (1873) LR 8 CP 107 at 116; *Read v Brown* (1888) 22 QBD 128 at 131; *Trower and Sons Ltd v Ripstein* [1944] AC 254 at 263; *Board of Trade v Cayzer, Irvine & Co Ltd* [1927] AC 610 at 617; *Shtitz v CNR* [1927] 1 DLR 951 at 953; *Williams v Milotin* (1957) 97 CLR 465 at 474.

146 So to regard a "cause of action", as the facts or events giving rise to a right to sue for a remedy, gives effect to the natural meaning of the word "cause". If one asks the question, what "caused" the wrong sought to be remedied by action, the natural answer is, the events giving rise to the suffering of the wrong. Here of course there need not even be a wrong to ground the action. An accident, whether negligently caused or not, is necessary and sufficient. "Cause of action" in legal parlance is often used interchangeably with the remedy sought: for example, a claim for an injunction, or an account, or for restitution. It may be that the words "right of action" may be more apt than "cause of action" if a label on the claim were mandatory. The former is a term which may in some circumstances be used interchangeably with the latter. All of this serves to show that "cause of action" is not an expression of fixed meaning. I do not think that to state that "the plaintiff claims damages under an enactment" or, "the plaintiff claims damages under Pt IV of the Act" would be the only way to state a cause of action within the meaning of r 6A of the Rules. I would not therefore read "cause of action" unless the context in which it is used requires it, as meaning the label for the claim. Rule 6A of Pt 5 does not so require.

147 That is enough to dispose of this appeal. The action, brought in this case by the respondent by the filing of the statement of claim stating these facts sufficed: of an accident; that it occurred during disembarkation from an aircraft after an identified journey; where and when it occurred; that it caused the respondent personal injury; that it was a claim against the appellant; the number of the respondent's ticket, that is the contract for the total journey; and the date and issuer of it. Those facts give rise to one, and only one claim, and remedy.

148 It does not matter, contrary to a suggestion in argument, that the holding of a relevant licence under ss 26 and 27 of the *Civil Aviation Act* 1988 (Cth) attracting the operation of the Act, was not pleaded. What the respondent did plead was enough to show that the respondent had travelled on an aircraft operated by a carrier whose reputability and legality were recognized by the willingness of another notoriously substantial operator to issue tickets on its behalf, to and from airports at recognizable towns. The appellant, as a licensed operator, could not possibly have been taken by surprise by the absence of any pleading in terms of its holding of a licence or licences[92]. Furthermore, there is no reason why a presumption of lawfulness should not be made as contemplated by r 6 of Pt 9, that is, that the appellant was operating the flight lawfully, as the holder of all relevant licences.

149 Nothing that I have said should be taken as casting doubt upon the common law principle, stated in *Weldon v Neal*, or as suggesting that a right of

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**92** See Pt 9 r 9(1) of the District Court Rules.

action under the Act, a federal law, once extinguished can be resurrected under and by a State law or a rule of court of a State.

150 I agree in the orders proposed by Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ.