HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, GORDON AND EDELMAN JJ

PARKES SHIRE COUNCIL APPELLANT

AND

SOUTH WEST HELICOPTERS PTY LIMITED RESPONDENT

Parkes Shire Council v South West Helicopters Pty Limited
[2019] HCA 14
8 May 2019
S140/2018

ORDER

1. *Appeal dismissed.*

2. *The appellant pay the respondent's costs of and incidental to the appeal.*

On appeal from the Supreme Court of New South Wales

Representation

N J Williams SC with P K Williams for the appellant (instructed by Moray & Agnew)

J T Gleeson SC with T J Brennan for the respondent (instructed by Norton White)

CATCHWORDS

Parkes Shire Council v South West Helicopters Pty Limited

Aviation – Carriage of passengers by air – Accident – Carrier's liability – Where respondent engaged by appellant to carry out survey using helicopter – Where passenger aboard helicopter killed in crash – Where Pt IV of *Civil Aviation (Carriers' Liability) Act 1959* (Cth) applied – Where s 28 provided that carrier liable for damage sustained by reason of death of passenger – Where s 35(2) substituted liability under s 28 for any civil liability of carrier under any other law in respect of death of passenger – Where s 34 imposes time limit on availability of right of action created by s 28 – Where widow, daughter and son of passenger brought claims in tort against appellant and respondent for damages for negligently inflicted psychiatric harm resulting from death of passenger – Where claims brought outside time limit prescribed by s 34 – Whether claims precluded by Act.

Words and phrases – "any civil liability of the carrier under any other law", "by reason of the death of the passenger", "claim", "damage sustained", "Hague Protocol", "in respect of the death of the passenger", "Montreal Protocol No 4", "negligently inflicted psychiatric harm", "tort", "Warsaw Convention".

Civil Aviation (Carriers' Liability) Act 1959 (Cth), ss 28, 34, 35(2), 37.

1 KIEFEL CJ, BELL, KEANE AND EDELMAN JJ. The sole issue in this appeal is whether a claim under the general law of tort for damages for negligently inflicted psychiatric harm[1] consequent upon the death of a passenger during air carriage to which Pt IV of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the CACL Act") applies[2] is precluded by that Act.

2 The appellant, a regional local authority, engaged the respondent to assist it to carry out by helicopter a low-level aerial noxious weed survey. On 2 February 2006, a helicopter operated for that purpose by the respondent, and piloted by Mr Shane Thrupp, an employee of the respondent, was carrying two of the appellant's officers, Mr Malcolm Buerckner and Mr Ian Stephenson. The helicopter struck power lines and crashed, killing all three occupants. A number of claims were made as a result of the accident[3].

3 This appeal is concerned with claims brought against both the appellant and the respondent by Mr Stephenson's widow, daughter and son ("the Stephensons") for damages for negligently inflicted psychiatric harm resulting from the death of Mr Stephenson. These claims were commenced in 2009, that is, more than two years after the date of the crash and outside the time fixed by s 34 of the CACL Act for the commencement of claims under that Act[4].

4 At first instance, each of the Stephensons was successful in his or her claim against the appellant and the appellant, in turn, obtained judgment for contribution against the respondent as co-tortfeasor under s 37(b) of the CACL Act. The respondent's appeal to the Court of Appeal of the Supreme Court of New South Wales was successful, and the issue now comes before this Court.

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1 An expression that is today preferable to "nervous shock". See *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394; [1970] HCA 60; *Jaensch v Coffey* (1984) 155 CLR 549 at 559-560; [1984] HCA 52; *Tame v New South Wales* (2002) 211 CLR 317 at 386 [204]; [2002] HCA 35 and the foreword of Sir Thomas Bingham to Mullany and Handford, *Tort Liability for Psychiatric Damage* (1993) at vii.

2 It was common ground that Pt IV of the CACL Act applies, pursuant to s 4 of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW).

3 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63 at 67-68 [1]-[4].

4 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63 at 68 [6].

5 For the reasons that follow, the Stephensons were entitled to claim against the respondent for damages for loss suffered by them by reason of Mr Stephenson's death pursuant to s 28 of the CACL Act. Section 35(2) of the CACL Act substituted that entitlement for any claim that might otherwise have been brought under domestic law. The Stephensons' entitlement to claim under s 28 of the CACL Act was extinguished by s 34 of that Act before their proceedings were commenced[5]. Accordingly, the appeal to this Court should be dismissed.

The Conventions

6 The liability of international air carriers to passengers has been the subject of a number of multilateral conventions to which Australia is a party. The first is the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929) ("the Warsaw Convention"). The Warsaw Convention has been amended several times, including by the Hague Protocol to Amend the Warsaw Convention (1955) ("the Hague Protocol") and by the Additional Protocol No 4 to the Warsaw Convention (1975) ("the Montreal Protocol No 4"). Various iterations of the Warsaw Convention are given force by the CACL Act. It is unnecessary for present purposes to discuss the interaction between the CACL Act and the Conventions[6].

7 Article 17 of the Warsaw Convention provides:

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

8 Article 24 of the Warsaw Convention originally provided:

> "1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

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5 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 270-271 [59]; [2005] HCA 38.

6 cf *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 199-202 [13]-[23]; [2005] HCA 33.

> 2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

9 The Montreal Protocol No 4 amended Art 24. Section 1 of the amended Art 24 provides:

> "In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights."

10 In the United Kingdom it has been held that Art 24 of the Warsaw Convention has the effect that claims falling within Art 17 may only be brought "subject to the conditions and limits set out in this Convention". In *Sidhu v British Airways Plc*[7], Lord Hope of Craighead, with whom Lord Browne-Wilkinson, Lord Jauncey of Tullichettle, Lord Mustill and Lord Steyn agreed, said of the Convention:

> "The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals – and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law."

11 In *Stott v Thomas Cook Tour Operators Ltd*[8], Lord Toulson, with whom Lord Neuberger of Abbotsbury, Baroness Hale of Richmond, Lord Reid and Lord Hughes agreed, referred with approval to the observations of Lord Hope in *Sidhu*. Lord Toulson noted[9] that a similar approach had been adopted by the Supreme Court of the United States in *El Al Israel Airlines Ltd v*

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7 [1997] AC 430 at 453.

8 [2014] AC 1347 at 1369 [29]-[30], 1370 [34].

9 [2014] AC 1347 at 1370-1373 [35]-[43].

Tseng[10] and subsequently by the United States Court of Appeals for the Second Circuit in *King v American Airlines Inc*[11].

12 These decisions do not address the particular issue before this Court, but they make the important point that the purpose of the Warsaw Convention is both to create, and at the same time to limit, the liability of a carrier "for damage sustained in the event of the death" of a passenger. It is to be noted, however, that the purpose of the Convention is not confined to the creation and limitation of the liability of a carrier for the death of a passenger.

Legislation

13 The CACL Act is a legislative response to the Warsaw Convention. By s 11(1) of the CACL Act, the Warsaw Convention as amended by the Hague Protocol has the force of law in Australia, and by s 25K of the CACL Act the Warsaw Convention as amended by the Hague Protocol and the Montreal Protocol No 4 has the force of law in Australia. It is the CACL Act that is determinative of the issue before the Court.

14 In Pt IV of the CACL Act, s 28 provides:

> "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."

15 The provision of critical importance to the resolution of this appeal is s 35(2). It is desirable to set s 35 out in full:

> "(1) The provisions of this section apply in relation to liability imposed by this Part on a carrier in respect of the death of a passenger (including the injury that resulted in the death).
>
> (2) Subject to section 37, the liability under this Part is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger.

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10 (1999) 525 US 155.

11 (2002) 284 F 3d 352.

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

(4) To the extent that the damages recoverable include loss of earnings or profits up to the date of death, or funeral, medical or hospital expenses paid or incurred by the passenger before his death or by his personal representative, the liability is enforceable for the benefit of the personal representative of the passenger in his capacity as personal representative.

(5) For the purposes of subsection (3), the members of the passenger's family shall be deemed to be the wife or husband, de facto spouse, parents, step-parents, grandparents, brothers, sisters, half-brothers, half-sisters, children, step-children and grandchildren of the passenger, and, in ascertaining the members of the passenger's family, an illegitimate person or an adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adoptors.

(6) The action to enforce the liability may be brought by the personal representative of the passenger or by a person for whose benefit the liability is, under the preceding provisions of this section, enforceable, but only one action shall be brought in respect of the death of any one passenger, and such an action, by whomsoever brought, shall be for the benefit of all persons for whose benefit the liability is so enforceable who are resident in Australia or, not being resident in Australia, express the desire to take the benefit of the action.

(7) The damages recoverable in the action include loss of earnings or profits up to the date of death and the reasonable expenses of the funeral of the passenger and medical and hospital expenses reasonably incurred in relation to the injury that resulted in the death of the passenger.

(8) In awarding damages, the court or jury is not limited to the financial loss resulting from the death of the passenger.

(9) Subject to the next succeeding subsection, the amount recovered in the action, after deducting any costs not recovered from the defendant, shall be divided amongst the persons entitled in such

proportions as the court (or, where the action is tried with a jury, the jury) directs.

(10) The court may at any stage of the proceedings make any such order as appears to the court to be just and equitable in view of the provisions of this Part limiting the liability of the carrier and of any proceedings which have been, or are likely to be, commenced against the carrier, whether in or outside Australia."

16 It can be seen that s 28 of the CACL Act implements Art 17 of the Warsaw Convention by creating a liability that is distinct from any liability that might arise under domestic law. Putting to one side the liability created by s 28 for personal injury, the liability created by s 28 is relevantly for "damage sustained by reason of the death" of a passenger. It is that liability that s 28 creates which s 35(2) substitutes "for *any* civil liability of the carrier under *any* other law in respect of the death of the passenger" (emphasis added). The substitution so effected is clearly intended to be comprehensive. Apart from the effect of the language of s 35(2) itself, there are express indications in sub-ss (3), (5) and (6) of s 35 that persons other than the passenger whose death has occurred are within the contemplation of the section as persons who may sustain damage by reason of the death of the passenger, so that any claim they might otherwise have under the general law is within the scope of s 35(2).

17 Section 34 imposes a temporal limit on the availability of the right of action created by s 28. It provides:

"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."

18 Section 37 is concerned with the liability of a carrier to indemnity and contribution. It provides:

"Nothing in this Part shall be deemed to exclude any liability of a carrier:

(a) to indemnify an employer of a passenger or any other person in respect of any liability of, or payments made by, that employer or other person under a law of the Commonwealth or of a State or Territory providing for compensation, however described, in the nature of workers' compensation; or

(b) to pay contribution to a tort-feasor who is liable in respect of the death of, or injury to, the passenger;

but this section does not operate so as to increase the limit of liability of a carrier in respect of a passenger beyond the amount fixed by or in accordance with this Part."

19 Section 37 expressly preserves the operation of principles of domestic law governing indemnity or contribution by quarantining the operation of these principles from s 35(2). That said, the "liability of a carrier" referred to in the concluding words of the section is plainly that created by s 28. Section 37 tends to confirm that the words of s 28 comprehend the possibility of a liability to third parties to the carriage relationship for damage sustained by them by reason of the death of a passenger. In this regard, it would not have been necessary to provide that s 35(2) is subject to s 37 if "the liability under this Part", that is, the liability created by s 28, was not intended to be substituted for liabilities that might arise to persons other than passengers.

The decision at first instance

20 In the Supreme Court of New South Wales, Bellew J held that the Stephensons' claims in tort for damages for negligently inflicted psychiatric harm did not fall within the ambit of s 35(2) of the CACL Act[12]. His Honour concluded that because the Stephensons' claims were to be determined at common law rather than under the CACL Act, they were not extinguished by the operation of s 34 of the CACL Act, and allowed them. In reaching this conclusion, Bellew J considered himself bound by the decision of the Full Court of the Federal Court of Australia in *South Pacific Air Motive Pty Ltd v Magnus*[13].

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12 *Stephenson v Parkes Shire Council* (2014) 291 FLR 319.

13 (1998) 87 FCR 301.

Magnus

21 In *Magnus*, an aeroplane flying from Sydney to Norfolk Island crashed shortly after take-off. Although no passengers died in the crash, a representative proceeding was brought on behalf of both passengers and non-passengers for physical and psychological injury[14]. The Full Court (Sackville J, Hill J agreeing and Beaumont J dissenting) held that claims for psychiatric injury by non-passengers were outside the ambit of Pt IV of the CACL Act, and so were not out of time.

22 Sackville J reached this conclusion even though the Court held unanimously that the claims by passengers for psychological injuries were out of time by reason of s 34 of the CACL Act[15]. His Honour rejected a submission that s 35(8) of the CACL Act indicated that s 35(2) encompassed psychiatric harm claims brought by non-passengers[16]. An important aspect of his Honour's reasoning was that[17]:

> "The duty of care owed by a carrier to a non-passenger not to expose him or her to a risk of nervous shock, is independent of the carrier's duty to the passenger ... Had the drafters [of the CACL Act] intended to bring nervous shock claims by non-passengers within s 35 of the [CACL] Act, much clearer language than that used in s 35(8) would have been used."

23 Hill J, agreeing with Sackville J, observed that[18]:

> "Claims against carriers clearly falling outside the terms of the Conventions can easily be imagined. A plane might crash and injure a bystander; a plane might crash and damage property; a plane might run into another plane and injure the pilot or passengers in that other plane; a non-passenger might observe a plane crash and suffer physical damage. There is nothing in the Conventions which suggests that there was any intention to limit the liability of carriers in such situations. In these

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14 (1998) 87 FCR 301 at 303-304.

15 (1998) 87 FCR 301 at 318, 319, 344.

16 (1998) 87 FCR 301 at 348-349.

17 (1998) 87 FCR 301 at 349.

18 (1998) 87 FCR 301 at 321.

> situations the person injured has no contractual relationship with the carrier. No notice of limitation of liability will be drawn to the attention of such a non-passenger suffering loss or damage arising out of an aircraft action. So it can not be said, at least to the extent of the above claims, that the Conventions were intended to be a complete code in respect of non-passengers. Clearly, however, the Conventions were intended to be a complete code with respect to passengers.
>
> Likewise there is nothing in the [CACL] Act which suggests that that Act was intended to govern claims by non-passengers of the kind to which I have referred above."

24 Beaumont J, in dissent, held that on a literal reading of the CACL Act "a person other than a passenger could fall within ... Pt IV, if he or she sustained psychological damage by reason of the death or personal injury of a passenger"[19]. His Honour went on to conclude that there was no reason, "by adopting a purposive method of interpretation, why such a literal construction should not be adopted"[20]. Beaumont J said[21]:

> "It is apparent that Pt IV was intended to operate exclusively, as a code, in the event of the death or personal injury of a passenger in an aircraft accident. In that area, Pt IV provides some benefits not available under the general law, yet is also restrictive of the rights of a plaintiff at common law in some respects."

25 It may be said immediately that the dissenting view of Beaumont J better accords with the approach of the House of Lords in *Sidhu* than the dicta of Sackville J and Hill J. Beaumont J was rightly focused upon the evident intention of the CACL Act to create uniform and exclusive rules as to the liability of a carrier for events involving injury to or the death of passengers in accordance with the intent of the Warsaw Convention.

26 Sackville J acknowledged that the circumstance that the duty of care owed by a carrier to a non-passenger not to expose him or her to a risk of psychiatric harm is independent of the carrier's duty to the passenger "may not be a major

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19 (1998) 87 FCR 301 at 318.

20 (1998) 87 FCR 301 at 318.

21 (1998) 87 FCR 301 at 318.

consideration in the interpretation of the Warsaw Convention"[22]. Indeed, in 1929 such an independent duty of care was still in very early stages of development in England and Australia[23]. Nevertheless, Sackville J proceeded to focus upon the legal basis under domestic law for the claim, rather than upon the logically anterior question posed by the text of the CACL Act, which was whether the liability asserted by the plaintiff was "in respect of the death of the passenger". The ingredients of a claim for damages under domestic law were relevant only if a claim under domestic law had not been excluded by s 35(2) of the CACL Act. In effect, Sackville J must be taken to have read s 35(2) as if it spoke only of a liability "*for* the death of the passenger".

27 Hill J was evidently swayed to take a view different from that taken by Beaumont J because his Honour was impressed by the consideration that "[a] plane might crash and injure a bystander [or] damage property", and claims under domestic law in respect of damage arising in this way could not sensibly be regarded as excluded by the Warsaw Convention or the CACL Act. With respect, there can be no doubt that such claims are outside the scope of the Convention and the CACL Act. But it is far from obvious that that is so because of the absence of a contract between the carrier and the injured party, rather than because the damage postulated in the examples given by Hill J is plainly not "damage sustained in the event of the death or wounding of a passenger" within Art 17 of the Convention.

The decision of the Court of Appeal

28 The Court of Appeal of the Supreme Court of New South Wales (Basten and Payne JJA; Leeming JA dissenting) allowed the respondent's appeal by majority[24]. Basten JA concluded[25] that "the preemptive scope of the Convention depends not on the qualitative nature of the act or omission giving rise to the claim but on when and where the salient event took place".

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22 (1998) 87 FCR 301 at 349.

23 *Tame v New South Wales* (2002) 211 CLR 317 at 376-377 [178]-[181]; *Bourhill v Young* [1943] AC 92 at 111.

24 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63.

25 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63 at 89 [90], quoting *Stott v Thomas Cook Tour Operators Ltd* [2014] AC 1347 at 1372 [42].

29 Basten JA observed that the decision in *Magnus* was, "at best, of limited and indirect relevance"[26]. Basten JA was correct in this regard in that *Magnus* was not directly concerned with the operation of s 35 because it was not concerned with the death of a passenger and liabilities said to be "in respect of" that death. In addition, in *Magnus* only Sackville J referred to the operation of s 35 of the CACL Act. Basten JA went on to say[27]:

> "[T]he approach adopted [by the majority in *Magnus*] in relation to the Convention (and the Carriers' Liability Acts) appears to assume that each is restrictive of rights under domestic law and should be read narrowly for that reason. However, that is to see only one side of the picture. The fact that the liability of the carrier is not dependent upon establishing negligence, but only damage sustained by reason of an accident on an aircraft, may be highly beneficial to the passenger."

30 Basten JA concluded that it is not possible, as a matter of the ordinary use of language, to characterise the Stephensons' claims as other than assertions of liability "in respect of" Mr Stephenson's death. On that basis, his Honour concluded that the claims were excluded by s 35(2) of the CACL Act, and should have been dismissed[28].

31 In dissent, Leeming JA held that s 35(2) did not preclude a non-passenger's claim for damages for negligently inflicted psychiatric harm. In so holding, his Honour referred in particular to three considerations[29]:

> "(1) The first is the significance to be given to the contract of carriage, and the regime reflecting a compromise between the contracting parties, rather than affecting the tortious claims of non-passengers for breaches of duties owed by the carrier directly to them ...
>
> (2) Secondly, that is confirmed by what I regard as the weight of persuasive authority, reflected in the majority judgments in [*Magnus*] ...

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26 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63 at 103 [158].

27 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63 at 103-104 [159].

28 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63 at 104 [163].

29 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63 at 150-151 [350].

(3) Thirdly, I place some weight on the totality of legislation in this area, including legislation conferring rights upon non-passengers who suffer injury ..."

The scope of s 35(2) of the CACL Act

32 The reasoning of Basten JA is to be preferred. As a matter of the ordinary and natural meaning of s 35(2) of the CACL Act, the Stephensons' claims asserted the civil liability of the respondent in respect of the death of a passenger. There was an immediate and direct relationship between the asserted liability of the carrier and the death of the passenger.

33 The Stephensons were entitled to claim damages from the respondent pursuant to s 28 of the CACL Act. That entitlement was, by reason of s 35(2), exclusive of their entitlement to claim damages for negligence under the law of tort. So, as Basten JA explained, there is no reason to seek to read down s 35(2) in order to preserve the rights of the Stephensons to make a claim in respect of Mr Stephenson's death. In this regard, s 35 did not deny their claims; the Stephensons each had a claim under the CACL Act. Indeed, s 35(2), by dispensing with the need to prove negligence on the part of the respondent, facilitated the prosecution of those claims. An integral aspect of the scheme was, however, that s 34 limited the temporal availability of those claims.

34 As to the first of the considerations referred to by Leeming JA, the liability contemplated by Art 17 of the Warsaw Convention and s 28 of the CACL Act is event-based; it is not concerned to draw upon the legal character of the event as a matter of domestic law. In particular, it is not fault-based in terms of the domestic law of civil wrongs, nor, importantly, is it tied to a contractual relationship between carrier and passenger. The persons who may sustain damage that may be the subject of a claim under s 28 are not confined to those who are carried pursuant to a contract of carriage. Section 35(2) of the CACL Act, in providing for substitution for other forms of civil liability, being those arising "under any other law", employs language that comprehensively describes any basis, and any legal theory, which might ground a carrier's civil liability other than the provisions of Pt IV.

35 The dicta in *Magnus* on which Leeming JA relied should not be followed. The only limitation upon the liabilities comprehended by s 35(2) is that they be "in respect of" the death of the passenger. The broad relational phrase "in respect of", used in this context, is distinctly inappropriate to confine the operation of the CACL Act so as to defer to the domestic law of the place where the liability of the carrier is sought to be established.

36 The third consideration referred to by Leeming JA is focused upon the "rights of non-passengers". But the focus of ss 28 and 35(2) is upon the liability of carriers for damage in respect of the death of a passenger. It was the evident intention of the Warsaw Convention and the CACL Act to limit that liability notwithstanding the domestic law of participating nations. The "cardinal purpose"[30] of the CACL Act in giving effect to the Convention was to achieve uniformity in the law relating to liability of air carriers, so that, in those areas with which the Convention deals, it contemplates a uniform code that excludes resort to domestic law. A construction of Pt IV consistent with the purpose of the Convention is to be preferred, especially given that by s 11(1) of the CACL Act the Warsaw Convention as amended by the Hague Protocol has the force of law in Australia, and s 25K has the same effect in respect of the Warsaw Convention as amended by the Hague Protocol and the Montreal Protocol No 4.

Orders

37 The appeal should be dismissed.

38 The appellant should pay the respondent's costs of and incidental to the appeal.

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30 *El Al Israel Airlines Ltd v Tseng* (1999) 525 US 155 at 169.

39 GORDON J. Parkes Shire Council engaged South West Helicopters Pty Limited to undertake an aerial survey to determine the presence of noxious weeds. On 2 February 2006, a helicopter piloted by an employee of South West Helicopters took off from an aerodrome in Parkes, New South Wales, with two council employees – Ian Stephenson and Malcolm Buerckner – to conduct the survey. Whilst in flight, the helicopter struck an overhead power line, exploded and crashed. All three persons on board were killed.

40 The *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the Carriers' Liability Act (Cth)") regulates the civil liability of an air carrier for damage by reason of the death of a passenger, or personal injury suffered by a passenger, resulting from an accident which took place on board an aircraft or in the course of embarking or disembarking[31].

41 There was no dispute that the helicopter flight was regulated by Pt IV of the Carriers' Liability Act (Cth), as applied to air carriage within New South Wales by the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) ("the Carriers' Liability Act (NSW)"). Section 35(2), in Pt IV of the Carriers' Liability Act (Cth), relevantly provides that liability of a carrier under that Part "is in *substitution* for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger" (emphasis added).

42 Proceedings were commenced in 2009 in the Supreme Court of New South Wales by Mr Stephenson's widow, daughter and son, against Parkes Shire Council and South West Helicopters. Mr Stephenson's widow, daughter and son each brought a claim for psychiatric injury resulting from Mr Stephenson's death. Mrs Stephenson also brought a claim on her own behalf and on behalf of her children under the *Compensation to Relatives Act 1897* (NSW). Mrs Stephenson and her children did not make a claim against the owner of the power lines, Essential Energy, but Essential Energy was joined by South West Helicopters. There were, relevantly, cross-claims brought by South West Helicopters and Essential Energy as well as related proceedings between these corporate entities.

43 The complexity of the proceedings led to a number of judgments. The trial judge – Bellew J – relevantly held that all three defendants and cross-defendants were negligent and apportioned responsibility between South West Helicopters (70 per cent), Parkes Shire Council (20 per cent) and Essential Energy (10 per cent).

44 In relation to the claims for psychiatric injury resulting from Mr Stephenson's death, Bellew J found that s 35(2) of the Carriers' Liability Act

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31 Carriers' Liability Act (Cth), s 28.

(Cth) did not preclude Mr Stephenson's widow and children claiming – separately to the Carriers' Liability Act (Cth) – against South West Helicopters. A majority of the Court of Appeal of the Supreme Court of New South Wales (Basten JA, with whom Payne JA agreed) disagreed and allowed an appeal on that issue. Leeming JA dissented.

45 The question in this appeal is whether s 35(2) of the Carriers' Liability Act (Cth) precluded Mrs Stephenson and her children from pursuing their tortious claims against South West Helicopters because the claim was not instituted within the two-year limitation period in s 34 in Pt IV of the Carriers' Liability Act (Cth).

46 That question is raised by Parkes Shire Council because Mrs Stephenson and her children obtained judgment against the Council for nervous shock under the common law of tort as affected by the *Civil Liability Act 2002* (NSW). Mrs Stephenson also obtained judgment against Parkes Shire Council under the *Compensation to Relatives Act*. Parkes Shire Council obtained judgment against South West Helicopters, as a co-tortfeasor, under s 37(b) of the Carriers' Liability Act (Cth), up to the statutory limit of $500,000[32].

47 Parkes Shire Council contends that s 35(2) of the Carriers' Liability Act (Cth) should be construed as permitting Mrs Stephenson and her children to bring tortious claims against South West Helicopters, contrary to the conditions and limits of the Carriers' Liability Act (Cth), with the result that the Council would be entitled to a greater level of contribution from South West Helicopters as a co-tortfeasor.

48 As the majority of the Court of Appeal of New South Wales correctly concluded[33], the contentions of Parkes Shire Council should be rejected. Where damage is sustained by reason of the death of a passenger in the course of air carriage (including claims by non-passengers for nervous shock flowing from the death of the passenger), the civil liability of an air carrier is imposed exclusively by, and is subject to the conditions and limits of, the Carriers' Liability Act (Cth). Any right Mrs Stephenson and her children had to damages for nervous shock against South West Helicopters under the Carriers' Liability Act (Cth) had been extinguished because their claims were not brought within the prescribed two-year limitation period[34].

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32 Carriers' Liability Act (Cth), s 31.

33 *South West Helicopters Pty Ltd v Stephenson* (2017) 356 ALR 63.

34 Carriers' Liability Act (Cth), s 34.

The scheme

49 The Carriers' Liability Act (Cth)[35] provides that the following conventions have the force of law in Australia in relation to international carriage by air to which the relevant convention applies[36]: the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929)[37] ("the Warsaw Convention") (Pt III); the Warsaw Convention as amended at The Hague, 1955[38] (Pt II); the Guadalajara Convention[39] (Pt IIIA); and the Montreal No 4 Convention[40] (Pt IIIC) (together, "the Conventions"). The text of the Conventions is set out in separate schedules to the Carriers' Liability Act (Cth)[41].

50 Part IV of the Carriers' Liability Act (Cth), headed "Other carriage to which this Act applies", extends the carriers' liability for air carriage established by the Conventions to Australian domestic, inter-State carriage[42] through the

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35 Since the time of the accident the subject of this appeal, the Carriers' Liability Act (Cth) has been amended. The Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999 ("the 1999 Montreal Convention"), now also has force of law in Australia: see Pt IA of and Sch 1A to the Carriers' Liability Act (Cth), inserted by the *Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Act 2008* (Cth).

36 Some specified exclusions, which are not presently relevant, may be put to one side.

37 See Carriers' Liability Act (Cth), Sch 1.

38 Carriers' Liability Act (Cth), Sch 2.

39 Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (1961): see Carriers' Liability Act (Cth), Sch 3.

40 Warsaw Convention as amended at The Hague, 1955, and by Protocol No 4 of Montreal, 1975: see Carriers' Liability Act (Cth), Sch 5.

41 Carriers' Liability Act (Cth), s 8(1).

42 Carriers' Liability Act (Cth), s 27. See also *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 269-270 [52]-[53]; [2005] HCA 38.

enactment of provisions that are in similar, but not identical, terms to the articles of the Conventions given effect by Pts II, III, IIIA and IIIC[43].

51 Unlike Pts II, III, IIIA and IIIC, Pt IV does not give effect to Australia's international obligations under the Warsaw Convention and its successors. Instead, it "extends the principles of the amended convention[44] to all domestic carriage by air within Federal competence but with certain modifications which are considered more appropriate for domestic purposes"[45]. Certain provisions of Pt IV[46] are then applied to the carriage by air of a passenger within a given State (not being carriage to which the Conventions or Pt IV of the Carriers' Liability Act (Cth) applies) by the operation of State legislation[47]. In New South Wales that is achieved by the Carriers' Liability Act (NSW).

52 As with the introduction of Pt IV of the Carriers' Liability Act (Cth) and its application to domestic air carriage within the competence of the federal Parliament[48], the introduction of the Carriers' Liability Act (NSW) was to "make the carrier absolutely liable for damage sustained by reason of the death ... or injury" up to a fixed limit "or a higher sum which might be mutually agreed upon in the contract of carriage"[49]. Those provisions applied through the Carriers'

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43 In addition, s 25L in Pt IIIC extends the operation of ss 35-39 in Pt IV to carriage to which the Montreal No 4 Convention applies in the same way as those provisions apply to carriage under Pt IV.

44 At the time Pt IV was introduced, the Warsaw Convention as amended at The Hague, 1955.

45 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 903.

46 Other than ss 27, 40 and 41 in Pt IV. Part IVA, concerning carriers' obligations with respect to insurance against liability to passengers for death or personal injury, is also extended to intra-State carriage.

47 See Carriers' Liability Act (NSW), ss 4 and 5; *Civil Aviation (Carriers' Liability) Act 1961* (Vic), ss 4 and 5; *Civil Aviation (Carriers' Liability) Act 1962* (SA), ss 5 and 6; *Civil Aviation (Carriers' Liability) Act 1964* (Qld), ss 4 and 5; *Civil Aviation (Carriers' Liability) Act 1961* (WA), ss 5 and 6; *Civil Aviation (Carriers' Liability) Act 1963* (Tas), ss 4 and 5.

48 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 903, 905-906.

49 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 November 1967 at 2881.

Liability Act (NSW) are administered and enforced as if they were provisions applying as laws of the Commonwealth instead of as laws of the State[50].

53 Thus, the scheme by which the Conventions are given effect in Australian municipal law[51] has three inter-connected limbs: the Conventions are given the force of law in Australia with respect to international air carriage; elements of the Conventions are restated as separate provisions in the Carriers' Liability Act (Cth), including in Pt IV with respect to domestic, inter-State air carriage; and Pt IV is then applied to intra-State air carriage by State legislation.

The Conventions

54 The "cardinal purpose"[52] of the Warsaw Convention (and its successors[53]) is to "achiev[e] uniformity of rules governing claims arising from international air transportation"[54] of persons, baggage and goods. It responds to the prospect of a "jungle-like chaos"[55]: concerns about a lack of predictability with respect to carrier liability or the rights of passengers, as a consequence of multiple legal regimes potentially applying simultaneously to international air carriage and related conflict of laws issues. The rules laid down are, in effect, an "international code"[56]. In the areas with which it deals, the code is "intended to be uniform and to be *exclusive also of any resort to the rules of domestic law*"[57] (emphasis added).

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50 See Carriers' Liability Act (NSW), s 6A.

51 See *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [25]; [2005] HCA 33.

52 *El Al Israel Airlines Ltd v Tseng* (1999) 525 US 155 at 169. See also *In re Mexico City Aircrash of October 31, 1979* (1983) 708 F 2d 400 at 415-416.

53 See *Thibodeau v Air Canada* [2014] 3 SCR 340 at 367-368 [41].

54 *Tseng* (1999) 525 US 155 at 169, citing *Eastern Airlines Inc v Floyd* (1991) 499 US 530 at 552 and *Zicherman v Korean Air Lines Co Ltd* (1996) 516 US 217 at 230. See also *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 75; *Tseng* (1999) 525 US 155 at 167, 169-170; *Agtrack* (2005) 223 CLR 251 at 268 [50], quoting *Reed v Wiser* (1977) 555 F 2d 1079 at 1090; *Thibodeau* [2014] 3 SCR 340 at 367 [41].

55 *Reed* (1977) 555 F 2d 1079 at 1092. See also *Grein* [1937] 1 KB 50 at 75.

56 *Grein* [1937] 1 KB 50 at 74-75.

57 *Sidhu v British Airways Plc* [1997] AC 430 at 453.

55 Article 17 in Ch III of the Warsaw Convention imposes a form of liability on air carriers which is not dependent on proof of negligence. That Article establishes the conditions of liability for death or personal injury to a passenger[58]. The official version of the Warsaw Convention is in French[59]. The English translation[60] set out in the Schedules[61] to the Carriers' Liability Act (Cth) reads:

> "The carrier is liable for *damage sustained in the event of the death* or wounding *of a passenger* or any other bodily injury suffered by a passenger, *if the accident which caused the damage* so sustained *took place on board the aircraft or in the course of any of the operations of embarking or disembarking*." (emphasis added)

56 Article 17, as it appears in each of the successive Conventions, has the force of law in Australia in respect of carriage to which Pts II, III and IIIC apply[62] and, in Pt IV, was translated into s 28, headed "Liability of the carrier for death or injury". That section imposes "strict" liability on carriers[63] and provides:

> "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." (emphasis added)

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58 *Tseng* (1999) 525 US 155 at 162.

59 See Warsaw Convention, Art 36.

60 Acknowledging the possibility of inconsistency arising between the authentic French versions and English translations, s 8(2) of the Carriers' Liability Act (Cth) provides: "If there is any inconsistency between the text of a Convention as set out in a Schedule [to the Carriers' Liability Act (Cth)] and the text that would result if the authentic French texts of the instruments making up the Convention were read and interpreted together as one single instrument, the latter text prevails."

61 Article 17 was not amended by the successor Conventions which Australia had ratified and implemented at the time of the accident the subject of this appeal: see Art 17 in each of Schs 1, 2 and 5; cf Art 17 in Sch 1A to the Carriers' Liability Act (Cth), inserted by the *Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Act 2008* (Cth).

62 See Carriers' Liability Act (Cth), ss 11, 21, 25K.

63 *Agtrack* (2005) 223 CLR 251 at 260 [22]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 905.

57 Article 22 of the Warsaw Convention provides a cap on the liability of the carrier "for each passenger". That cap has the force of law in Australia in respect of international carriage and a cap is also prescribed, for carriage to which Pt IV applies, in s 31 of the Carriers' Liability Act (Cth). At the time of the accident, the prescribed cap was $500,000. Article 23 contains a prohibition on carriers contracting out of, or seeking to reduce, that cap. A similar prohibition is included in s 32 in Pt IV of the Carriers' Liability Act (Cth).

58 The scheme also contains a limitation on the period in which an action can be brought against a carrier. Article 29 of the Warsaw Convention as amended at The Hague, 1955, provides that the right to damages is extinguished if the action is not brought within two years. The method of calculating the limitation period is left to be determined by the law "of the Court seised of the case"[64]. Again, that Article is given the force of law in Australia in respect of international carriage and has its equivalent in s 34 of the Carriers' Liability Act (Cth) for carriage to which Pt IV applies. It also prescribes the method of calculation of the limitation period.

59 Although the Conventions are intended to be, and are, construed as an international code for air carriage, the code is not absolute. The Conventions recognise[65] that there are matters which are not to be unified but are left to the domestic law of a signatory. Aspects of Art 24 of the Warsaw Convention were of that kind.

60 Article 24, in the English translation[66], originally read as follows:

> "1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> 2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, *without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights*." (emphasis added)

61 The first part of Art 24(2) ("[i]n the cases covered by Article 17 the provisions of the preceding paragraph also apply"), when read with Art 24(1),

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64 Art 29(2) of the Warsaw Convention as amended at The Hague, 1955.

65 See, eg, Warsaw Convention, Arts 12, 13, 14, 16(1), 22(1), 24(2), 28(1), 29(2), 34. See also Mankiewicz, *The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System* (1981) at 13.

66 As set out in Sch 1 to the Carriers' Liability Act (Cth).

operates to impose the conditions and limits in the Warsaw Convention on any action for damages however founded arising out of the death, wounding or bodily injury of a passenger in the course of carriage. Article 24(2) then goes on to provide that, in those events, the auxiliary[67] questions about who has the right to bring suit (the identity of the plaintiffs) and what are their respective rights (the heads of damage for which they may sue and the legal basis on which they may sue for that damage) are left for determination by domestic law (the local law identified by the law of the forum under its choice-of-law rules).

62 The effect of Art 24(1) is to ensure that actions covered by Arts 18 and 19, as well as Art 17 subject to Art 24(2), are only able to be brought against a carrier in accordance with the Conventions – that is, subject to the conditions and limitations in the Conventions – and not otherwise.

63 That limitation in Art 24(1), and the first part of Art 24(2), is implemented in Pts II and IV (and applied in Pts III and IIIC[68]) of the Carriers' Liability Act (Cth). In Pt IV, in respect of the death of a passenger, it is implemented in s 35(2)[69].

64 It is necessary to set out the full text of s 35, headed "Liability in respect of death", which provides:

> "(1) The provisions of this section apply in relation to liability imposed by this Part on a carrier in respect of the death of a passenger (including the injury that resulted in the death).
>
> (2) Subject to section 37, the liability under this Part is *in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger* or in respect of the injury that has resulted in the death of the passenger.
>
> (3) Subject to the next succeeding subsection, the liability is enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.
>
> (4) To the extent that the damages recoverable include loss of earnings or profits up to the date of death, or funeral, medical or hospital

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67 *Tseng* (1999) 525 US 155 at 170, citing *Zicherman* (1996) 516 US 217 at 221, 227, 231.

68 Respectively by operation of ss 24 and 25L.

69 In respect of personal injury to a passenger, s 13 (Pt II) and s 36 (Pt IV) are in similar terms.

expenses paid or incurred by the passenger before his death or by his personal representative, the liability is enforceable for the benefit of the personal representative of the passenger in his capacity as personal representative.

(5) For the purposes of subsection (3), the members of the passenger's family shall be deemed to be the wife or husband, de facto spouse, parents, step-parents, grandparents, brothers, sisters, half-brothers, half-sisters, children, step-children and grandchildren of the passenger, and, in ascertaining the members of the passenger's family, an illegitimate person or an adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adoptors.

(6) The action to enforce the liability may be brought by the personal representative of the passenger or by a person for whose benefit the liability is, under the preceding provisions of this section, enforceable, but only one action shall be brought in respect of the death of any one passenger, and such an action, by whomsoever brought, shall be for the benefit of all persons for whose benefit the liability is so enforceable who are resident in Australia or, not being resident in Australia, express the desire to take the benefit of the action.

(7) The damages recoverable in the action include loss of earnings or profits up to the date of death and the reasonable expenses of the funeral of the passenger and medical and hospital expenses reasonably incurred in relation to the injury that resulted in the death of the passenger.

(8) In awarding damages, the court or jury is not limited to the financial loss resulting from the death of the passenger.

(9) Subject to the next succeeding subsection, the amount recovered in the action, after deducting any costs not recovered from the defendant, shall be divided amongst the persons entitled in such proportions as the court (or, where the action is tried with a jury, the jury) directs.

(10) The court may at any stage of the proceedings make any such order as appears to the court to be just and equitable in view of the provisions of this Part limiting the liability of the carrier and of any proceedings which have been, or are likely to be, commenced against the carrier, whether in or outside Australia." (emphasis added)

65 As will be self-evident, s 35(2), similarly to Art 24(1), expressly provides that the liability under Pt IV is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger[70].

66 The balance of s 12 (Pt II) and s 35 (Pt IV) then provides the answers to what have been earlier described as the auxiliary questions[71]. For carriage to which the Conventions apply, this is necessary, through s 12, to fill the gap that is left by the second part of Art 24(2). Although Pt IV does not apply the Conventions but rather extends the substance of the Conventions to domestic, inter-State carriage, the purpose behind the provisions can be taken to be the same. That is, the balance of ss 12 and 35 responds to the fact that the Conventions provide no guidance on who may sue or their respective rights. Those sections are an answer to, rather than a translation or implementation of, the balance of Art 24(2).

67 Indeed, during the Second Reading Speech for the *Civil Aviation (Carriers' Liability) Bill 1959* (Cth), the then Minister for Defence, in addressing Pt IV and, in particular, s 35, not only recognised that "[t]he convention is completely silent on the matters to be taken into account in assessing damages resulting from death … so that the assessment of damages is governed by domestic law" but also went on to note that the Bill dealt with aspects of problems arising from common law principles, through parts of s 35[72]. One of the examples given by the Minister was that s 35(8) makes it clear that a court in assessing damages is free to include compensation for matters not involving direct pecuniary loss such as loss of consortium where a spouse is killed, or, in the case of a claim on behalf of infants, additional compensation for loss of a parent's care and guidance.

68 Finally, s 35(2) is subject to s 37[73], which provides that:

> "Nothing in this Part shall be deemed to exclude any liability of a carrier:
>
> (a) to indemnify an employer of a passenger or any other person in respect of any liability of, or payments made by, that employer or

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70 Section 12(2) is to the same effect in respect of liability under Pt II.

71 See *Agtrack* (2005) 223 CLR 251 at 260 [22]-[23].

72 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 906.

73 Which is in substantially the same terms as s 14 in Pt II of the Carriers' Liability Act (Cth).

other person under a law of the Commonwealth or of a State or Territory providing for compensation, however described, in the nature of workers' compensation; or

(b) to pay contribution to a tort-feasor who is liable in respect of the death of, or injury to, the passenger;

but this section does not operate so as to increase the limit of liability of a carrier in respect of a passenger beyond the amount fixed by or in accordance with this Part."

69 As Basten JA[74] explained in the Court of Appeal, although the provisions in Pt IV might suggest a degree of independence from the Conventions, when the sections are read in the context of their counterpart provisions in the Conventions there is a degree of uniformity. Section 35 has a similar[75] counterpart in Pt II[76], and both ss 28 and 35 are drawn from the Conventions in the manner just described. The matters left to Australian domestic law *do not affect* the uniform operation of the code in defining international carriers' liability. Indeed, the most important objective in applying the principles of the Conventions to domestic air carriage, it was said, was to "deprive the domestic carriers of their present [common law] right to contract out of all liability for damage howsoever caused"[77].

70 The primary focus for the purposes of this appeal is the intention of the Commonwealth and New South Wales Parliaments, not just the intentions of the framers of the Conventions. However, there was no dispute that ss 28 and 35 in Pt IV should be given a construction harmonious with other substantively similar sections in different Parts of the Carriers' Liability Act (Cth) and the

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74 *South West Helicopters* (2017) 356 ALR 63 at 90 [98].

75 Note that s 12 and s 35 differ slightly as s 12 contains, as its sub-s (11), the following: "The second sentence of paragraph 4 of Article 22 of the Warsaw Convention, as amended by the Hague Protocol, shall not be construed as applying to an action to which this section applies that is wholly or partly for the benefit of a person or persons other than the plaintiff, but the court may, in such an action, deal with any question of costs in such manner as it thinks proper having regard to the operation of that sentence in cases to which it applies."

76 With the provision in Pts II and IV respectively applying to carriage under Pts III and IIIC.

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

Conventions[78], which have the force of law in Australia and which were the basis on which ss 28 and 35 were included in the Carriers' Liability Act (Cth).

Exclusivity principle

71 Article 24 of the Warsaw Convention gives effect to what has been described as the "exclusivity principle"[79] – that a claim falling within, relevantly, Art 17 "can only be brought subject to the conditions and limits set out in [the] Convention". That, in turn, directs attention to the scope of Art 17.

72 The scope of Art 17 does not depend on the qualitative nature of the act or omission that gives rise to the claim but when and where the "event" took place[80]. The essential element of a claim within Art 17 is an event – relevantly, the death of a passenger, in an accident on board a flight (or in the course of embarking or disembarking).

73 If the basis of the claim satisfies the terms of Art 17, the liability of the carrier is limited to that provided by the terms of the applicable convention[81]. On the other hand, if there is no claim within the terms of Art 17, there is no remedy. As Lord Hope of Craighead explained in *Sidhu v British Airways Plc*, the whole purpose of Art 17, read in context, was to prescribe the only circumstances in which a carrier would be liable to the passenger for claims arising out of that person's international carriage by air[82]. That principle has been

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78 *Povey* (2005) 223 CLR 189 at 202 [24]-[25], 230-231 [128]-[134]; *Agtrack* (2005) 223 CLR 251 at 270 [54]; *Air Link Pty Ltd v Paterson* (2005) 223 CLR 283 at 303-304 [49]; [2005] HCA 39.

79 *Stott v Thomas Cook Tour Operators Ltd* [2014] AC 1347 at 1370-1373 [34]-[44]. See also *Thibodeau* [2014] 3 SCR 340 at 366 [38].

80 *Stott* [2014] AC 1347 at 1372 [42].

81 *Stott* [2014] AC 1347 at 1369 [29]-[30], 1370-1371 [34]-[40], citing *Sidhu* [1997] AC 430 and *Tseng* (1999) 525 US 155.

82 [1997] AC 430 at 447, cited in *Stott* [2014] AC 1347 at 1370 [34].

applied in the United States[83], Hong Kong[84], Canada[85] and New Zealand[86], amongst other jurisdictions[87].

74 As has been seen, s 28 of the Carriers' Liability Act (Cth) was drawn from Art 17, although the text of Art 17 and s 28 differs. Putting those differences aside, which are not presently relevant, it is apparent that Art 17, as well as s 28, draws on three different concepts – damage, the death of the passenger and the accident which caused the damage.

75 Thus, Art 17 and s 28 relevantly impose liability on a carrier where (1) there has been a death of a passenger; (2) that death resulted from an accident which took place in the course of a flight; and (3) there is "damage sustained by reason of the death" of the passenger (s 28) or "in the event of the death" of the passenger (Art 17). The distinctions between these three concepts are important. The *damage* sustained is distinct from the *accident*, and both the damage and the accident are distinct from the *death*[88]. The *damage* is sustained by reason of the death of the passenger if it is factually caused by it. Damage can be sustained by a non-passenger. And the damage can be physical, mental or pecuniary[89].

76 Put in different terms, liability under Art 17 and s 28 depends on when and where the event – relevantly, the death of the passenger – took place. That Art 17 and s 28 are in that form is unsurprising. Each was intended to, and does, resolve complex conflict of laws questions that could arise where air travel crosses borders. What the scheme imposes is a single, unified, indivisible form of strict liability on the carrier upon a defined event – relevantly, the death of a passenger during carriage by air.

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83 See *Tseng* (1999) 525 US 155 at 160-161.

84 *Ong v Malaysian Airline System Bhd* [2008] 3 HKLRD 153 at 160-162 [15]-[20].

85 *Thibodeau* [2014] 3 SCR 340 at 365-367 [37]-[40].

86 *Emery Air Freight Corporation v Nerine Nurseries Ltd* [1997] 3 NZLR 723 at 726-728, 737.

87 See, eg, *Cauchi v Air Fiji* [2005] Tonga LR 154; *Hennessey v Aer Lingus Ltd* [2012] IEHC 124 at [5.3]-[5.4], [6.5].

88 See *Povey* (2005) 223 CLR 189 at 204-205 [34].

89 See *Zicherman* (1996) 516 US 217 at 223-224.

77 The subsequent changes made to Art 24[90] do not detract in any way from the exclusivity principle. As Ginsburg J (delivering the opinion of the Supreme Court of the United States) stated in *El Al Israel Airlines Ltd v Tseng*[91], the Montreal Protocol No 4 clarified, but did not change, the domain of exclusivity.

78 That leaves the second part of Art 24(2), which provides that the exclusivity principle applies, insofar as liability under Art 17 is concerned, "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights". As Ginsburg J explained in *Tseng*, the drafters of Art 24 of the Warsaw Convention intended to resolve whether the air carrier was liable but to leave to the domestic law determination of compensation[92].

79 Thus, by the express terms of Art 24(2), the Warsaw Convention provides no "unified rule" as to who has a right to bring a suit against a carrier in the event of the death, wounding or other bodily injury suffered by a passenger or what rights that person might have, including what damages they might recover[93]. The effect is to leave those matters to domestic law[94], including matters to be taken into account in the assessment of damages[95].

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90 Article 24 was reformulated in the Montreal No 4 Convention, and then again in the 1999 Montreal Convention, when it was renumbered as Art 29. It now reads:

> "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."

91 (1999) 525 US 155 at 174-175.

92 (1999) 525 US 155 at 170, 174-175. See also *Sidhu* [1997] AC 430 at 447.

93 *Zicherman* (1996) 516 US 217 at 226-227.

94 See *Zicherman* (1996) 516 US 217 at 223-225, 227; *Tseng* (1999) 525 US 155 at 170.

95 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 906.

80 What the international code *does* prescribe is that: first, in the event of, relevantly, death, the carrier is liable; second, the extent of that carrier's liability is capped; and, third, any claim sounding in damages from that liability will be extinguished if not commenced within the two-year limitation period.

81 The Conventions are also limited to "international carriage"[96]. They were intended to supersede domestic laws only insofar as they covered international carriage, leaving domestic law "applicable only to the internal flights" of each of the signatory countries[97].

82 With respect to claims against carriers arising from international carriage, domestic courts "are not free to provide a remedy according to their own law, because to do this would be to undermine the Convention. It would lead to the setting alongside the Convention of an entirely different set of rules which would distort the operation of the whole scheme"[98].

83 That the Conventions, and Art 24 in particular, operate in that manner is illustrated by the facts in *Zicherman v Korean Airlines Co Ltd*[99], a decision of the Supreme Court of the United States. A Korean Air Lines flight (KE007) was shot down over the Sea of Japan, killing everyone on board. Two non-passengers, the mother and sister of a passenger on board the flight, sought to recover damages for "grief and mental anguish, for the loss of the decedent's society and companionship, and for the decedent's conscious pain and suffering"[100]. Scalia J, writing for the Court, after reviewing the relevant preparatory work for the Warsaw Convention and the post-ratification conduct of the signatories to the Warsaw Convention, held that the liability imposed by Art 17, and then capped by the Warsaw Convention, was exclusive but subject to the conditions and limits in subsequent articles. Scalia J also recognised that Art 17 could extend carriers' liability to liability for harm including purely psychological harm done to third parties but did not affect the substantive questions of who may bring suit and what they may be compensated for: these questions are to be answered by the domestic law selected by the courts of the contracting states[101]. That is, the question whether any person could recover

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96 See *Grein* [1937] 1 KB 50 at 76.

97 *Reed* (1977) 555 F 2d 1079 at 1090.

98 *Sidhu* [1997] AC 430 at 454.

99 (1996) 516 US 217.

100 *Zicherman* (1996) 516 US 217 at 219.

101 *Zicherman* (1996) 516 US 217 at 225.

damages for certain harm, and if so what kind of damages, was left to the domestic law[102].

84 In *Zicherman*, the applicable domestic law, the *Death on the High Seas Act*, only permitted recovery of pecuniary losses and, accordingly, damages for grief and mental anguish could not be recovered by the non-passenger plaintiffs[103]. Had the domestic law permitted the non-passengers to recover damages for grief and mental anguish, the Court would have permitted recovery. This is because, as the Court recognised, Arts 17 and 24(2) of the Warsaw Convention permitted compensation only for legally cognisable harm, as a result of the death of the passenger in the course of the flight, but left the specification of what harm was legally cognisable to the applicable domestic law[104].

85 *Zicherman* was followed by the Supreme Court of the United States in *Tseng*. The issue in *Tseng* was whether a passenger was able to recover damages for purely psychological injury when Art 17 relevantly imposed liability on a carrier *only* where there was "bodily injury" caused by an accident on board an aircraft (or embarking or disembarking)[105]. Relevantly for this appeal, the Court considered Arts 17 and 24(2) and, in particular, held that Art 17 applied to *all* personal injury claims stemming from an accident on board an aircraft (or embarking or disembarking) – if recovery was not allowed under the Conventions, it was not available at all[106]. The Court held that Art 17 was concerned with an event – the accident[107]. That construction did not refer to the identity or capacity of the plaintiff to sue: it was *event-based*. The Court considered that its decision was to the same effect[108] as the decision of the House of Lords in *Sidhu*.

86 Since *Tseng*, a number of courts have adopted the reasoning in that decision, namely, that Art 17 directs attention to "when and where an event takes place in evaluating whether a claim for an injury to a passenger is preempted" so

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102 *Zicherman* (1996) 516 US 217 at 226-228.

103 (1996) 516 US 217 at 230-231.

104 See *Zicherman* (1996) 516 US 217 at 231.

105 (1999) 525 US 155 at 160.

106 *Tseng* (1999) 525 US 155 at 161.

107 *Tseng* (1999) 525 US 155 at 168-169.

108 *Tseng* (1999) 525 US 155 at 175-176.

that "the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered"[109].

Section 35(2) of the Carriers' Liability Act (Cth)

87 The question which arises then is how, if at all, those two aspects of Art 24 are reflected in Pt IV of the Carriers' Liability Act (Cth). Part IV does not give effect to Australia's international obligations under the Conventions. Instead, it "extends the principles of the amended convention to all domestic carriage by air within Federal competence but with certain modifications which are considered more appropriate for domestic purposes"[110].

88 Those modifications are, first, that domestic carriers are not given a defence for taking all necessary measures to avoid damage[111] and, second, that even if the damage results from an act or omission done with intent to cause it, the limitation on liability will still apply[112]. The modifications were aimed at greater certainty surrounding the extent of the liability of carriers in the domestic sphere[113].

89 The matters left to Australian domestic law do not affect the uniform operation of the code in defining international carriers' liability. However, Pt IV is still to be given a construction which is harmonious with that which applies to the international carriage dealt with under the Conventions[114], as is any State Act applying those provisions to *intra*-State carriage.

90 The qualification that those international rules are applied to domestic airline operators only insofar as the federal Parliament is competent to do so is important. Regulation of domestic operators engaged in purely intra-State

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109 *King v American Airlines Inc* (2002) 284 F 3d 352 at 360-361, quoted in *Stott* [2014] AC 1347 at 1372 [42]. See also *Tseng* (1999) 525 US 155 at 171; *Ong* [2008] 3 HKLRD 153 at 175-176 [71]; *Thibodeau* [2014] 3 SCR 340 at 379 [68].

110 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 903.

111 cf Warsaw Convention, Art 20.

112 cf Warsaw Convention, Art 25; Warsaw Convention as amended at The Hague, 1955, Art 25.

113 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 906.

114 *Agtrack* (2005) 223 CLR 251 at 270 [54].

carriage was recognised, at the time the Bill was before Parliament, as a matter for the States[115]. It was recognised that it was "very desirable" to have uniform rules applying to all classes of domestic carriage and that, in the long run, such uniform rules could be achieved by a number of methods[116]. As already noted, some of the provisions of Pt IV – excluding ss 27, 40 and 41 – apply to intra-New South Wales carriage by operation of s 5 of the Carriers' Liability Act (NSW).

91 The effect of the introduction of the Carriers' Liability Act (NSW) was to "make the carrier absolutely liable for damage sustained by reason of the death ... or injury" up to a fixed limit "or a higher sum which might be mutually agreed upon in the contract of carriage"[117]. It was observed during the Second Reading Speech for the Bill for the introduction of the Carriers' Liability Act (NSW) that, at the time, the liability of operators in relation to purely intra-State carriage was covered by common law principles. The necessity to prove negligence meant that "the passenger's right to sue for damages [was] thus of little value in many cases, because in serious aircraft accidents, it [was] usually extremely difficult, if not impossible, to prove negligence"[118].

92 It is necessary to turn to the text of s 35 of the Carriers' Liability Act (Cth) and, in particular, s 35(2).

93 As has been seen, s 35(2) relevantly provides that "the liability under [Pt IV] is in *substitution* for any civil liability of the carrier under any other law *in respect of the death of the passenger* or in respect of the injury that has resulted in the death of the passenger" (emphasis added). The liability under Pt IV is to be found in, and is created by, s 28.

94 Section 35(2) states that the liability in s 28 is in *substitution* for any civil liability of the carrier under any other law *in respect of* the death of the passenger. The phrase "in respect of" is a phrase of the widest import[119]. In its

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

116 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 April 1959 at 908.

117 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 November 1967 at 2881.

118 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 November 1967 at 2882.

119 See *Unsworth v Commissioner for Railways* (1958) 101 CLR 73 at 87-88, 90-91; [1958] HCA 41.

terms, s 35(2) refers to, and requires there to be, some discernible and rational link or connection between the two matters identified: the basis of the liability – carriage by air – and the death of the passenger. Liability, as has been seen, is event-based.

95 Section 35(2) does not expressly address *who* may have sustained the damage. That is left to s 35(3)-(10). For example, it is apparent that s 35(2) is not limited to damage sustained by the deceased passenger: s 35(3) expressly provides that "the liability is enforceable for the benefit of such of the members of the passenger's family as *sustained damage* by reason of his death" (emphasis added).

96 Moreover, "damage" is not defined in the Carriers' Liability Act (Cth), the Carriers' Liability Act (NSW) or the Conventions. And "damage" cannot be limited to economic or financial loss. Not only is the word "damage" used in s 28 in relation to both the death of a passenger and the personal injury of a passenger, but s 35(8) provides that "[i]n awarding damages, the court … is not limited to the financial loss resulting from the death of the passenger".

97 The question which then arises is the manner in which Australia has implemented the second part of Art 24(2). As has been seen, s 35(3)-(10) of the Carriers' Liability Act (Cth) address some of those questions. In other respects, the applicable law is addressed by the States.

98 Thus, given that the connection sought to be made is between the civil liability of the carrier and, in this case, the death of the passenger, the liabilities caught by s 35(2) are intended to, and do, extend to liabilities to non-passengers including a claim by them under the *Compensation to Relatives Act*, for loss of consortium[120] and for solatium[121]. In addition, a claim by an employer for loss of an employee's services[122], a Lord Campbell's Act claim[123], and a claim for nervous shock suffered on learning of the death of the passenger under the *Civil Liability Act* would fall within s 35(2), with the central element in each claim being the death of the passenger.

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120 See generally *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412 at 421-422; [1966] HCA 56.

121 See generally *Public Trustee v Zoanetti* (1945) 70 CLR 266; [1945] HCA 26.

122 See generally *Barclay v Penberthy* (2012) 246 CLR 258 at 279-283 [28]-[40]; [2012] HCA 40.

123 See *Agtrack* (2005) 223 CLR 251 at 256-257 [3], [5]. See generally *Grein* [1937] 1 KB 50.

99 That is, like its counterpart in Art 24(1) from which it is drawn, the field of exclusivity in s 35(2) is greater than the scope of liability under s 28 (and its counterpart, Art 17)[124].

100 That construction of s 35(2) is reinforced by other sections in Pt IV of the Carriers' Liability Act (Cth). Section 31 contains a cap on liability, in respect of each passenger, by reason of the injury or death of that passenger from an accident; s 32 contains a prohibition on carriers contracting out or seeking to reduce that cap; s 33 addresses the liability of servants and agents of a carrier and, where that servant or agent proves that they acted within the scope of their employment and authority, provides that the servant or agent is entitled to avail themselves of the cap; and s 34 contains a limitation on the period in which an action can be brought against a carrier.

101 Next, s 37 expressly removes or carves out from the field of exclusivity claims for contribution and indemnity against the carrier in two distinct fields[125]. It provides that "[n]othing in this Part shall be deemed to exclude any liability of a carrier" (a) to indemnify an employer of a passenger for workers' compensation payments or (b) to pay contribution to a tortfeasor who is liable in respect of the death of, or injury to, the passenger.

102 That construction of s 35(2) – that it is to be construed consistently with the exclusivity principle of the Conventions – is further reinforced by the last few lines of s 37: that "this section does not operate so as to increase the limit of liability of a carrier in respect of a passenger" beyond the cap in s 31. These carve outs would be unnecessary if s 35(2) were construed as not recognising, and then creating in the Act, the exclusivity principle in Art 24.

103 Thus, s 35(2) leaves no room for an action to sue under domestic law other than within the conditions and limits in Pt IV on an action for damages arising out of the death of a passenger in the course of air carriage. And one of the conditions and limits is, as has been noted, the two-year limitation period.

Centrality of the contract

104 Parkes Shire Council emphasised the contractual relationship between passenger and carrier, and the need for close connection between plaintiff and passenger, for liability to be caught by s 35(2) of the Carriers' Liability Act (Cth).

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124 *Tseng* (1999) 525 US 155 at 168-172, 174-175; *Sidhu* [1997] AC 430 at 447.

125 See *United Airlines Inc v Sercel Australia Pty Ltd* (2012) 289 ALR 682 at 699 [67], 705 [99].

105 As Leeming JA said in the Court of Appeal, in dissent, "[t]he fundamental approach taken in all of the conventions is to identify the contract for international carriage and to ask by reference to the place of departure and the place of destination what conventions apply"[126]. Article 1(2) of the Warsaw Convention makes that clear. It provides:

> "For the purposes of this Convention the expression 'international carriage' means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention."

106 That is to say, for carriage with multiple stops and layovers, the interim stops do not matter. The terms of Art 1(2) are unsurprising. They are consistent with the purpose underpinning the Warsaw Convention and its successors: to avoid the "jungle-like chaos"[127] that could result if questions of liability in respect of international carriage were left to domestic laws to resolve.

107 The origin and destination of air carriage are just as important with respect to Australian domestic travel. In *Air Link Pty Ltd v Paterson*[128], this Court considered an accident alleged to have occurred during a stopover within Australia. Mr Paterson, a passenger, claimed to have been injured while disembarking a flight from Cobar (NSW) to Dubbo (NSW) but, because his ticket was for travel from Cobar to the Gold Coast (via Dubbo and Sydney), his travel was within the scope of the Carriers' Liability Act (Cth) (rather than the Carriers' Liability Act (NSW)).

108 Thus, a passenger's contract of carriage will determine whether the uniform rules apply in respect of the death of a particular passenger, and by which of the various methods the uniform rules apply. But that is not the same as saying that the *absence* of a contract between a non-passenger plaintiff and a carrier means that liability of the carrier to that non-passenger in respect of the

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126 *South West Helicopters* (2017) 356 ALR 63 at 139 [299]; see also at 143 [319].

127 *Reed* (1977) 555 F 2d 1079 at 1092.

128 (2005) 223 CLR 283.

death of a passenger falls outside the Conventions or Pt IV. As has been seen, liability covered by the Conventions and Pt IV is event-based.

109 Aspects of the Conventions, including the manner in which the uniform rules are given effect under Australian law, support the conclusion that they are intended to be broadly applicable and wholly exclusive in respect of all liability[129], not just that which would arise from a contractual relationship between carrier and passenger. One of the core principles underpinning the Warsaw Convention was the idea of a compromise for the purpose of achieving uniformity[130]. Carriers previously had the ability to contract out of all liability[131]. In return for giving up that right and, perhaps more fundamentally, for having imposed upon them a provision that removes the need for proof of negligence, both the extent of carriers' liability (in monetary terms) and the period during which claims could be brought were strictly limited under the Warsaw Convention.

110 It would go against the spirit of the negotiated compromise and the concept of an exclusive, uniform, international code for convention signatories to conclude that carriers would still be "on the hook" for claims arising out of, or in relation to, damage resulting from a death for which they were not otherwise liable simply because there was no direct contractual relationship between the plaintiff and the carrier.

111 Moreover, such a contention is inconsistent with the manner in which the uniform rules are given effect in Australia. For example, s 42 of the Carriers' Liability Act (Cth)[132] imposes the limits of the carriers' liability on stowaways – persons without any contractual arrangement with the carrier.

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129 Subject to the two express exemptions in s 37 of the Carriers' Liability Act (Cth).

130 See *Sidhu* [1997] AC 430 at 443, 446-447; *Tseng* (1999) 525 US 155 at 170-171; *Thibodeau* [2014] 3 SCR 340 at 369-370 [46]. See also *Povey* (2005) 223 CLR 189 at 230-231 [131], 232 [137]; *Air Link* (2005) 223 CLR 283 at 309 [72], 312 [82], 323 [124]. See generally Flynn, "The Interpretation of the Warsaw Convention in Wrongful Death Actions" (1979) 3 *Fordham International Law Journal* 71 at 76.

131 With respect to contracting out of liability to dependants, in 1955 the Supreme Court of Queensland upheld a provision endorsed on a passenger's ticket as being effective to bar any recovery by dependants: *Martin v Queensland Airlines Pty Ltd* [1956] St R Qd 362, especially at 368, 378.

132 See also Carriers' Liability Act (NSW), s 6; *Civil Aviation (Carriers' Liability) Act 1961* (Vic), s 6; *Civil Aviation (Carriers' Liability) Act 1962* (SA), s 7; *Civil Aviation (Carriers' Liability) Act 1964* (Qld), s 6; *Civil Aviation (Carriers'*

(Footnote continues on next page)

112 Finally, the combined effect of s 35(2) and s 37 is to ensure that carriers are liable to indemnify an employer of a passenger or to pay contribution to a tortfeasor who is liable in respect of death or injury to a passenger. Those are the only matters to which the exclusivity in s 35(2) is to be read as subject.

113 The agreement or arrangement between the passenger and the carrier is important for establishing whether (and through which part of the framework) the uniform rules apply. But the absence of a direct contractual relationship between a non-passenger plaintiff and a carrier does not prevent a claim by that non-passenger plaintiff from being caught by the uniform rules.

114 To the extent that the decision of the Full Court of the Federal Court in *South Pacific Air Motive Pty Ltd v Magnus*[133] holds to the contrary, that part of the decision should not be followed. The Full Court held, by majority (Hill J and Sackville J, Beaumont J dissenting), that claims by non-passengers for psychological injury are not governed by the Carriers' Liability Act (Cth)[134]. A core step in the reasoning of each of the majority judges was the absence of a contractual relationship (a ticket) between the carrier and a non-passenger[135], with the result that the parents of the passengers in that case were permitted to bring claims for nervous shock after all claims under Pt IV had been extinguished. The majority's reasoning is contrary to the cardinal purpose of the Conventions and misstates the significance of the contract or arrangement between passenger and carrier to questions of liability.

No separate treatment of non-passengers

115 Parkes Shire Council submitted that the negotiating history of the Warsaw Convention supported a construction of Art 17 which drew a distinction between the liability of the carrier for passengers and freight, on the one hand, and liability to third parties, on the other hand. Parkes Shire Council submitted that the former were covered by the Conventions, whereas the latter were not. That contention should be rejected. As the analysis of the scheme, the Conventions and the exclusivity principle makes clear, such a contention is contrary to the terms of Art 17 and the way in which that Article has been interpreted in Australia and internationally.

Liability) Act 1961 (WA), s 7; *Civil Aviation (Carriers' Liability) Act 1963* (Tas), s 6.

133 (1998) 87 FCR 301.

134 *Magnus* (1998) 87 FCR 301 at 322, 349-350; cf at 318-319 per Beaumont J.

135 See *Magnus* (1998) 87 FCR 301 at 346-347, 350; see also at 320-322; cf at 318 per Beaumont J.

116 The second basis on which Parkes Shire Council contended that non-passengers were to be treated separately to passengers under the Carriers' Liability Act (Cth) was that their claims are "derivative". That contention needs some unpacking.

117 The Court of Appeal, including Leeming JA, correctly concluded that claims under the *Compensation to Relatives Act* are caught by s 35(2) of the Carriers' Liability Act (Cth). As Leeming JA explained, claims under the *Compensation to Relatives Act* are "very closely connected with the passenger's death"[136]. His Honour described those claims as derivative[137]. That description, or division, of claims as derivative or non-derivative is distracting and should not be adopted.

118 As has been explained, the exclusivity principle, and the liability imposed on a carrier, is event-based[138] – any action for damages however founded arising out of the death, wounding or bodily injury of a passenger in the course of carriage. The exclusivity principle is not concerned with the identity of the plaintiff. It is concerned with whether there is an event – relevantly, the death of a passenger in an accident in the course of carriage.

119 Claims by Mrs Stephenson and her children for pure mental harm under the *Civil Liability Act* arise out of the death of a passenger (Mr Stephenson) in the course of carriage. Section 30 of the *Civil Liability Act* limits recovery for pure mental harm arising "wholly or partly from mental or nervous shock in connection with another person (the victim) being killed, injured or put in peril by the act or omission of the defendant"[139] to witnesses at the scene or "close member[s] of the family"[140] of the victim. In setting the scope of the duty of care, s 32(1) provides that "[a] person (the defendant) does not owe a duty of care to another person (the plaintiff) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, *in the circumstances of the case*, suffer a recognised psychiatric illness if reasonable care were not taken" (emphasis added).

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136 *South West Helicopters* (2017) 356 ALR 63 at 137 [291].

137 See *South West Helicopters* (2017) 356 ALR 63 at 135 [286]; see also at 101 [147], 102 [150] per Basten JA.

138 See [72], [76] above.

139 *Civil Liability Act*, s 30(1).

140 *Civil Liability Act*, s 30(2).

120 Those circumstances are described in s 32(2) as including:

> "(a) whether or not the mental harm was suffered as the result of a sudden shock,
>
> (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,
>
> (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,
>
> (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant."

121 In addition, and perhaps most relevantly, s 30(4) provides:

> "No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission *would be prevented by* any provision of this Act or *any other written or unwritten law*." (emphasis added)

122 On any view, liability of a carrier under the *Civil Liability Act* for pure mental harm suffered by a passenger's family members in the event of their death is "civil liability of the carrier under any other law in respect of the death of the passenger" under s 35(2) of the Carriers' Liability Act (Cth). The question, and the answer, are directed to the occurrence of an event. They are not concerned with whether the claim is derivative or non-derivative. And even if the *Civil Liability Act* did not contain a provision to the effect of s 30(4), the result would be the same.

Conclusion

123 The literal words of s 28 are broad, capturing "damage sustained by reason of the death of the passenger". No basis has been identified for giving those words a narrower construction than their literal meaning, which meaning extends to psychiatric injury sustained by family members of a passenger after the passenger's death.

124 And s 35(2) is equally broad. With two very limited exceptions, it applies to make liability under s 28 (and related limitations) a substitute for any civil liability of the carrier under any other law in respect of the death of the passenger. Any liability to Mr Stephenson's family that might have been found to exist under the *Civil Liability Act* for psychiatric injury resulting from the sudden shock of Mr Stephenson's death was liability under "any other law" in respect of the death of Mr Stephenson.

125 Section 35(2) therefore operated to preclude the Stephenson family from bringing a claim in respect of that psychiatric injury other than in accordance with Pt IV of the Carriers' Liability Act (Cth), namely within the two-year limitation period prescribed in s 34 of the Carriers' Liability Act (Cth).

Orders

126 The appeal should be dismissed with costs.