

BETWEEN:

PARKES SHIRE COUNCIL
(ABN 96 299 629 630)
Appellant

and

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

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

2. **The statutory scheme:** The *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (*Cth Act*) and related State Acts comprise a comprehensive scheme for regulating the civil liabilities of air carriers for, put broadly, the damage which may be sustained in the event of the death or personal injury of a passenger or the destruction, loss or injury to the baggage of a passenger, during the course of the air operation.

3. This scheme uses three legal techniques: (a) Parts II, III, IIIA, IIIC provide that the Warsaw and later conventions have the force of law in Australia in relation to international carriage by air to which they respectively apply; (b) Part IV states provisions, drawn from the conventions, applied to commercial transport operations in interstate, Territory or overseas trade and commerce not otherwise covered by the conventions; and (c) the State Acts regulate commercial transport operations wholly within a State by picking up the relevant provisions of Parts IV and IVA of the *Cth Act*. (RS 7-10)

4. The present case arises directly under s 5 of the 1967 *NSW Act* and indirectly under Parts IV of the *Cth Act*. The critical provisions, ss 35(2) and 37(b) of the *Cth Act*, should be read harmoniously with: (a) the identically expressed provisions in ss 12(2), 24 and 25L; and (b) the underlying convention provision in Art 24: *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [45]-[54]. (RS 11-18)

5. **Section 28/Art 17:** Section 28 imposes an event-based liability on the carrier where: (a) there is a death/personal injury of a passenger in the course of a defined air operation; (b) resulting from an 'accident'; (c) and 'damage sustained by reason of' that death/injury. The accident, the death and the damage are distinguished in Art 17 and s. 28: *Povey v Qantas* (2005) 223 CLR 189 at [33]-[36]. (RS 19-34)

6. 'Damage' is used in s 28/Art 17 in the sense of legally cognisable harm. Damage is 'sustained by reason of' the death/injury if it is factually caused by it. It can be sustained by a non-passenger. It can be physical, mental or pecuniary: *Zicherman v Korean Airlines Co Ltd* 516 US 217 (1996) at 223-224.

7. Section 28 resolves the complex conflicts of laws questions that might otherwise arise where air travel crosses borders by establishing a single, indivisible, strict liability in the carrier once the defined event arises; subject to a single monetary cap under s 31, limitation of action under s 34 and reduction for contributory negligence under s 39; leaving aside the

“auxiliary” questions: (a) who may sue; (b) for what harms; and (c) under what legal theories. (RS 37-40)

8. **Section 35/Art 24:** Section 35(2), like *Art 24*, confirms the implicit negative in s 28/*Art 17*: that the new liability is to be in substitution for any theories of liability that may otherwise arise under the conflicts rules or law of the forum. Section 35(3)-(10) then answers, as a mandatory law of the forum, the “auxiliary” questions. (RS 61)

9. “In respect of” in s 35(1), and when first used in s 36, delineates the aspect of the liability created under s 28 to which ss 35 and 36 respectively apply. In s 35(2), and when second used in s 36, the phrase connects two things: “any civil liability of the carrier under
10 any other law” – a phrase of the widest import which does not lend itself to derivative/non-derivative distinctions – with the event of the death/ injury of the passenger during the air operation. All that is needed is a discernible and rational link between the basis of liability and the death/injury: Basten JA at [105]. (RS 62-67)

10. The equivalent meaning of *Art 24* is made clear in the Montreal conventions: *El Al Israel Airlines Ltd v Tseng* 525 US 155 (1999) at 174-175. The field of exclusivity under s 35(2)/*Art 24* is greater than the scope of liability under s 28/*Art 17*. *Tseng* at 168-172 and *Sidhu v British Airways Plc* [1997] AC 430 at 447 explain the policy reasons underlying the conventions which require this result, in reasoning applicable beyond passenger claims. These conclusions are assisted by a comparative law analysis. (RS 40-53)

20 11. Where “*in respect of*” connects a legal liability with personal injury resulting in death, the legal liabilities it contemplates extend to liabilities to third parties; including a *Compensation to Relatives Act 1897* (NSW) (*CRA*) type claim (*Unsworth v Commissioner for Railways* (1958) 101 CLR 73 at 87–88 and 90-91); and for loss of consortium (*State Government Insurance Office v Crittenden* (1966) 117 CLR 412 at 421 and 422); *Workers Compensation Board v Technical Products* (1988) 165 CLR 642 is distinguishable.

12. A liability of a carrier for damages for pure mental harm suffered by a close family member arising from mental or nervous shock on learning of the death of a passenger during an air operation (cf *Civil Liability Act 2002* (NSW) (*CLA*) ss 28-34) is a ‘civil liability of the carrier...*in respect of the death of the passenger*’ within s 35(2). Like a *CRA* claim, or a claim
30 for loss of consortium, or for solatium (*Public Trustee v Zoanetti* (1945) 70 CLR 266) or a claim by an employer for loss of an employee’s services (*Barclay v Penberthy* (2012) 246 CLR 258 at 279 to 283), the plaintiff must prove own damage beyond the death of the passenger. The ever-reducing distinctions in domestic legal theory between the Lord Campbell Act claim and the nervous shock claim (see *Law Reform (Miscellaneous*

Provisions) Act 1944 (NSW) ss 3 and 4, Jaensch v Coffee and ss 30-34 of the CLA) confirm that both fall within the exclusivity of s 35(2). The centrality of the death of the passenger to the liability of each party to the family is evident on the present facts (AB 117-133). (RS 73)

13. **Section 37:** The width of the exclusion under s 35(2) is confirmed by the need for the carve out in s 37 for claims for contribution or indemnity against the carrier: *United Airlines v Sercel* (2012) 260 FLR 37 at [67], [70] and [99].

14. **Policy considerations:** This construction avoids exposing international airlines to uncapped liabilities under Australian law for damage factually caused by death or injury occurring in the course of carriage by air; when liability for that damage stems from an event within the scope of *Art. 17* and other States recognise those liabilities as recoverable under the conventions, thereby aiding the uniformity purpose of the conventions.

15. **Section 36:** *South Pacific Air Motive v Magnus* (1998) 87 FCR 301 should be overruled. (RS 75-79)

16. **Damage by Aircraft Acts:** Nothing in these Acts alters the answers to the questions posed by the appeal.

17. **Application – the family’s claim:** (a) the Respondent was liable under s 28 for the ‘damage sustained by reason of the death’; (b) the liability was enforceable by the family under s 35(3), (5) and (8); (c) whether damages could be recovered for mental harm turns on the meaning of s 35(8) providing for recovery, unlike in a CRA claim, for non-financial loss; (d) any liability under the Commonwealth Act was extinguished under s 34 as it was not sued on in time; (e) s 35(2) precluded resort by the family to either the CRA or the nervous shock/CLA claim as they each were liabilities ‘in respect of the death of the passenger’; (f) that is so, irrespective of the effect of s 35(8).

18. **Application – the Appellant’s claim:** (a) the Appellant was a tortfeasor liable to the family for both the nervous shock/CLA and CRA claims; (b) the Appellant’s claim against the Respondent for contribution under the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 5(1)(c) was prima facie barred by s 35(2) but saved by s 37(b) as the Appellant was a tort-feasor liable “in respect of” the death of the passenger; (c) Under s 37, the cap fixed under s 34 still applies. The Respondent has paid the Appellant the full cap so has no further liability. (RS 56, 72-74)