Liability of air carriers in negligence for psychiatric harm

Amy Campbell reports on *Parkes Shire Council v South West Helicopters Pty Limited* [2019] HCA 14

The High Court has unanimously held that non-passengers' claims for psychiatric harm arising from the death of a passenger in the course of air travel are exclusively governed by the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**CACL Act**) and the general law of tort does not apply.

CACL Act

The CACL Act is a legislative response to, and gives effect to, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929) (**Warsaw Convention**). Section 28 of the CACL Act provides that, where Pt IV of the CACL Act applies to the carriage of a passenger, '*the carrier is liable for damage sustained by reason of the death of the passenger… which took place on board the aircraft…*'.

Section 35(2) of the CACL Act relevantly provides that '*…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…*'.

A temporal limit on claims under s 28 is imposed by s 34 of the CACL Act, which extinguishes the right of a person to damages if an action is not brought within two years.

Background

The Aappellant, Parkes Shire Council (**Council**), engaged the respondent, South West Helicopters Pty Ltd (**South West**) to assist it to carry out by helicopter a low-level aerial noxious weed survey. In February 2006, a helicopter piloted by an employee of South West carrying two of the Council's officers including Mr Ian Stephenson crashed, killing all three occupants.

Among other claims, Mr Stephenson's widow, daughter and son (**Stephensons**) claimed damages for negligently inflicted psychiatric harm against the Council and South West. Those claims were commenced in 2009, outside the two year time period imposed by s 34 of the CACL Act.

At first instance before Bellew J, each of the Stephensons was successful against the Council, and the Council in turn obtained judgment against South West as co-tortfeasor under the CACL Act. Bellew J held that the

Stephensons' claims did not fall within s 35(2) of the CACL Act. His Honour considered himself bound by the decision of the Full Court of the Federal Court of Australia in *South Pacific Air Motive v Magnus* (1998) 87 FCR 301 (***Magnus***), in which the Court held that claims by non-passengers for psychiatric harm were outside the scope of Pt IV of the CACL Act.

South West's appeal was successful in the Court of Appeal (Basten and Payne JJA; Leeming JA dissenting). Basten JA (Payne JA agreeing) considered the decision in *Magnus* to be, at best, of limited and indirect relevance. His Honour considered the claims to be excluded by s 35(2), as it was not possible as a matter of the ordinary use of language to characterise the claims as other than assertions of liability '*in respect of*' Mr Stephenson's death. Therefore, the claims were excluded by s 35(2). Leeming JA held that s 35(2) did not preclude a non-passenger's claim, having regard to the regime reflecting a compromise between contracting parties, *Magnus* and the totality of legislation in the area with respect to the rights of non-passengers.

The High Court's decision

The Court unanimously held the Stephensons' claims were excluded by s 35(2) of the CACL Act.

Kiefel CJ, Bell, Keane and Edelman JJ, in a joint judgment, considered that '*[a]s 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 the passenger*': at [32]. Their Honours observed that there was an '*immediate and direct relationship*' between the asserted liability and the death of the passenger: at [32]. The effect of s 35(2) was that the Stephensons' entitlement to claim damages was exclusive of their rights in negligence under the law of tort: at [33].

As to the three matters referred to by Leeming JA, their Honours considered that the liability contemplated by s 28 of the CACL Act was event-based and not tied to a contractual relationship between carrier and passenger: at [34]. The dicta in *Magnus* should not be followed; the use of '*in respect of*' in the context of s 35(2) was '*distinctly inappropriate*' to confine the operation of the CACL Act: at [35]. Their Honours also noted that the purpose of the CACL Act, in giving effect to the Warsaw Convention, was to achieve uniformity in the law relating to the liability of air carriers and a construction consistent with that purpose was to be preferred: at [36].

Gordon J similarly considered the Stephensons' claims to be within the scope of s 35(2). After analysing the Warsaw Convention, her Honour concluded that the absence of a contractual relationship did not preclude the application of the CACL Act and, to the extent *Magnus* held to the contrary, it should not be followed: at [104]-[114]. Her Honour considered that the history and scheme of the Warsaw Convention did not support a distinction being drawn between the liability of carriers for passengers and non-passengers: at [115].

Her Honour also rejected the Council's contention that claims by non-passengers were '*derivative*' and were to be treated separately. Her Honour observed that such a distinction was '*distracting*' and did not address the question posed by the CACL Act, which was concerned with the occurrence of an event: at [115]-[122].