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Plaintiff

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# Crash and cash

***South Pacific Air Motive Pty Ltd v Magnus (Fed Ct of Aust FC)***

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*The case South Pacific Air Motive Pty Ltd v Magnus (9/9/98, Beaumont, Hill and Sackville JJ) concerned the events of 24 April 1994, when a light aircraft operated by the appellant, chartered to carry a group of students from Sydney to Norfolk Island, ditched into Botany Bay shortly after takeoff. Three years later, Mr Magnus, the respondent in the present action, initiated proceedings acting on behalf of six passengers and eight other persons claiming damages for injuries suffered as a result of this accident.*

The liability of commercial aircraft operators for injury suffered by passengers is governed by the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth). This statute was enacted for the purpose of adopting into Australian law the provisions of the *Warsaw Convention Relating to International Carriage by Air* (1929). Part IV of the Act provides that the provisions of the Convention apply also to Australian domestic air carriage.

## The Act

Section 28 of the Act provides that the carrier is liable for damage sustained by reason of any personal injury suffered by a passenger as a result of an aircraft accident. This liability is limited by the operation of s 34, which extinguishes any right of claim where more than two years has elapsed before action was commenced.

The passengers injured were therefore barred from bringing action under the Act by the operation of the limitation provision. Attempts were then made to ground actions in tort, contract and under the *Trade Practices Act* 1974 (Cth). These attempts were quickly thwarted by the operation of s 36 of the Act, which provides that liability with respect to injuries sustained in aircraft accidents shall be in accordance with the Act to the exclusion of other statutory or common law causes of action. Therefore the respondent passengers could not base their action elsewhere to circumvent the statutory limitation.

The most interesting point in this primary part of the case was the application of the principle to purely psychological injuries which manifested themselves independently of physical injury. The respondents submitted that the expression used in the Act "personal injury" should not be read any more broadly than "bodily injury", and that therefore purely psychological harm was outside the scope of the Act, thus making alternative causes of action available in respect of these injuries. Argument on this point was based on translation of the Warsaw Convention from its primary French text into an English version. The Convention was the primary document upon which the Australian statute was based, and the Convention itself is included as a schedule to the Act. The original Convention used the term *lésion corporelle* which was translated as "personal injury". The parties debated whether the translation was done in recognition of injury including more than bodily injury, or whether the translation was inaccurate and the French usage ought to be preferred, thus limiting the action to bodily injuries only.

## Intention of Parliament

The appellant air carrier contended that the legislature deliberately chose to use the expression "personal injury" knowing full well that its meaning in Anglo-Australian law encompassed the notion of psychological injury. The respondents argued contrarily that there was a clear inconsistency between the Convention and the Act. As the intention of the Act was to give the Convention force of law, recourse should be had to the primary instrument in order to resolve the inconsistency.

The question of interpretation was resolved in the judgment of Sackville J, who held that while the Act did bring into effect the Convention, any questions of interpretation were about interpretation of the Act, not the Convention. Therefore if "legislative intention" needed to be considered it ought to be the intention of the Australian Parliament, not the intention of the drafters of the Warsaw Convention.

In the present case, Part IV of the Act, relating to domestic air travel, while "obviously modelled" on the Convention, departs from the Convention not merely in terms of lexicon, but also by omitting and amending several Convention

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provisions and by inclusion of provisions in the Act which are not in the Convention. These differences clearly indicate that the Parliament was doing more than just reproducing the Convention as an Act – it was bringing to bear its own will upon the Convention to produce a new legislative creature.

According to his Honour, at the time the Act was framed, "it was well recognised in Australian law that a person who was in breach of a duty to take reasonable care could be liable for nervous or mental shock". As such it must be assumed that Parliament intended that mental and nervous injuries would be encompassed within the meaning of "personal injury". As such the Act did apply to purely psychological injuries and not just bodily injuries. These claims too were extinguished by the operation of the limitation period specified in s 34 of the Act.

### Rights of non-passengers

The next issue involved the rights of a group of claimants who were not actually passengers on the aircraft. They were parents of some of the passengers who claimed to have suffered psychological injury caused by their concern over the safety and well-being of their children involved in the accident. The Full Court was called on to decide whether the Act applied to these non-passenger claimants and whether they too were time barred from bringing action, and whether the Act was the exclusive source of remedy for non-passengers as it was for passengers. If it was exclusive, then once again the time limit would extinguish the claims.

Part IV of the Act substitutes for all other civil remedies "in respect of personal injury suffered by a passenger". Counsel for the air carrier submitted that, while the parents were not passengers, their nervous shock arose from concern over injuries suffered by their passenger children, and that owing to this causal connection the parents' claims were "in respect of" injuries suffered by passengers. Sackville J rejected this submission, holding instead that the provisions ought to be given their natural meaning as only affecting the claims of actual passengers.

Hill J, in his judgment agreed that the Act was not intended to be the exclusive code governing the rights of non-passengers injured by misdeeds of air carriers. His Honour found that the Convention, and therefore the Act based upon it, was intended to create a global code that would substitute for the law of contract of various jurisdictions, giving a uniform basis for injured passengers to ground an action, and also limiting carriers' liability in contract.

However no contract could ever be said to exist between an airline and a non-passenger or bystander, indeed no relationship existed at all. As non-passengers would have had no contractual remedy available, the Convention could not stand as a substitute for that remedy. The Convention code, no matter how exclusive and exhaustive it may be with respect to the rights of passengers, could not be exclusive in governing the rights of non-passengers. The non-passenger claimants were not subject to the limitation and could pursue any other statutory or common law remedies against the air carrier as they saw fit. ■

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# NSW tackles delays in cases against professionals

The NSW Supreme Court has established a professional negligence list in order to reduce delays and costs in the present common law list.

The list, to be managed by Justice Alan Abadee, will handle professional negligence matters against doctors, hospitals, dentists, chemists, solicitors and barristers.

The president of the Law Society, Mr Ron Heinrich, said yesterday that there were about 2,000 of these types of cases before the courts, some of which were up to 15 years old. Many had been sitting in the lists for more than five years.

The cost of these delays was adding about 30 per cent to the cost of professional indemnity insurance for all professions, he said.

NSW Chief Justice Jim Spigelman said yesterday that the list had the support of the Law Society, the GIO and the Medical Defence Union.

In this particular category of case, court delays had an impact on "every professional's current and future insurance premiums and upon the need to maintain reserves to meet claims", he said.

"This flows through to costs and charges for professional services supplied to the public."

Because hospitals are self-insurers, they are required to set aside part of their budgets as reserves for this type of claim.

The list was developed after consultation with professional and healthcare associations and after studying similar lists in the United Kingdom and in Victoria.

At the moment, all of these matters go to the common law division holding list, where they comprise about 15 per cent of the about 500 matters ready for hearing.

One quarter of that total figure is deemed to be long cases – taking more than eight hearing days – and can only be heard for the first two months of the law term, part of the effort to encourage counsel to run shorter cases.

However, the good news is that the total number of new professional indemnity filings is falling, from 240 in 1995 to 121 last year.

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