

RECENT DEVELOPMENTS – OR A TIRED OLD PLAYBOOK – IN AUSTRALIAN LAW ON CARRIERS' LIABILITY

Aviation Law Association of Australia and New Zealand

NSW Branch

24 September 2025

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The Warsaw Convention is among the most successful international agreements, in both coverage and effect.

Its full title is the Convention for the Unification of Certain Rules Relating to International Carriage by Air.

The rules that it unifies are applied by the domestic courts of 180 sovereign nations.

The working out of which rules are unified and what unification means has been a focus of the practice of aviation lawyers for over 90 years.

The Warsaw Convention has been updated by successive conventions and most recently by a new convention in similar terms, the 1999 Montreal Convention, the long title to which is also a Convention for the Unification of Certain Rules Relating to International Carriage by Air.

The Conventions were supplemented by the Guadalajara Convention the long title of which is a 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, the terms of which are incorporated into the Montreal Convention.

I will refer to the Warsaw Convention and its supplementary and successor Conventions as the Warsaw System.

The hard and detailed work in addressing which rules are unified and what unification means under the Warsaw System was undertaken primarily by the Courts of the United States dealing with passenger claims and the United States and United Kingdom dealing with cargo claims.

The United States courts are not unified: there are separate systems of Federal Courts and in each state. Passenger claims brought against airlines or their employees outside the Warsaw System were generally brought in State Courts while claims brought under the Warsaw System were brought in Federal Courts.

State courts and judges were familiar with applying their domestic tort law and for a long time they continued to do so – either by ignoring the Warsaw System's rules of exclusivity or finding reason to distinguish them. However, the exercise of jurisdiction by the State courts has been restricted as a result of the practice of airlines in having Convention cases removed to the Federal courts.

Over time the Federal Courts and their Circuit Courts of Appeal developed substantial expertise and jurisprudence in the law of the Warsaw System. In addressing the scope of exclusivity under the Warsaw System, a nuanced dispute emerged between various Circuit Courts of Appeal which affected the scope of Convention exclusivity. The dispute concerned whether Art. 17 of the Convention regulates causes of action under domestic law, or creates a cause of action under the Convention.¹

That period of uncertainty and conflict between the Courts of the United States was settled by the decisions of Justice Scalia writing for the Supreme Court in *Zicherman v Korean Airlines Co*² and Justice Ginsburg following and developing Justice Scalia's analysis in *El Al Israel Airlines Limited v Tsui Yuan Tseng*.³ The development in *Tseng* was preceded by a similar approach in the UK by the House of Lords in *Sidhu v British Airways plc*.⁴ The Warsaw System establishes the liability of air carriers while leaving to the law of domestic courts certain questions – including what damages are payable.

Since those decisions there has been no room to doubt that the primary and cardinal purpose of the Warsaw System is to achieve uniformity in the law relating to liability of international air carriage.⁵

So much has been accepted by our High Court in *Parkes Shire Council v South West Helicopters Pty Ltd*. The plurality of Chief Justice Kiefel and Justices Bell, Keane and Edelman stated:⁶

“The “cardinal purpose” 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.”

Justice Gordon was to like effect.⁷

“The “cardinal purpose” of the Warsaw Convention (and its successors) is to “achieve uniformity of rules governing claims arising from international air transportation” of persons, baggage and goods. It responds to the prospect of a “jungle like chaos”: 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. 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”.”

¹ See *In Re Mexico City Air Crash* (1983) 708 F 2d 400 at 409 – 412 (Ninth Circuit); *In Re Korean Airlines Air Disaster* (1983) 932 F 2d 1475 at 1488 (DC Circuit) and *In Re Air Disaster at Lockerby* (1991) 928 F 2d 1267 at 1273 (Second Circuit).

² (1995) 516 US 217 at 230.

³ (1998) 525 US 155 at 169.

⁴ [1997] AC 430.

⁵ *Zicherman* at 230; see also *Thibodeau v Air Canada* [2014] 3 SCR 340 at 367 [41].

⁶ (2019) 266 CLR 212 at 226 [36].

⁷ At 230 [54].

The application of that international code by Australian Courts has proved to be challenging for Australian lawyers and Courts.

On the one hand we have the advantage over the United States of having both federal and state courts exercising federal jurisdiction so that both apply the law of the Warsaw System.

On the other hand, the volume of aviation litigation in Australia has never been high so that there are few opportunities for lawyers, including judges, to develop a background in the Warsaw System.

The thinness of expertise becomes particularly acute at the level of our intermediate courts of appeal – of which there are nine which may hear appeals on Warsaw System disputes: the Courts of Appeal of each state and territory and the Full Court of the Federal Court.

That is, Australia has the same number of courts of appeal as the nine Circuit Courts of Appeal in the United States which deal with the whole of the USA's Warsaw System case load!

The problems of thin expertise have been mitigated through the bulk of Warsaw System litigation occurring in the courts of NSW and Victoria with appeals to the Courts of Appeal in those States – so that a small number of judges have had repeat exposure to Warsaw System issues on those Courts: for example over the last 10 years in NSW Justices Basten and Leeming were members of the NSW Court of Appeal, each had substantial experience and expertise in Warsaw System litigation and one or both of them was listed on any panel to hear a Warsaw System case.

The strengths and weaknesses of the operation of that system can be seen in the course of litigation which resulted in the High Court's decision in *Parkes Shire Council v South West Helicopters*. While that was a proceeding under the domestic law of the *Civil Aviation (Carriers Liability) Act 1967* (NSW) applying the Federal *Carriers Liability Act* it was accepted at all levels that the relevant principles were those drawn from the Warsaw System.

The trial Judge was a very experienced common law Judge. In considering claims for nervous shock and compensation to relatives by the three surviving family members of an employee of Parkes Shire Council who had died when the helicopter which was carrying him crashed, his Honour reasoned as many common lawyers do when confronted with the Warsaw System's strict limitation periods and liability caps: he did not apply them.⁸

On appeal, the NSW Court of Appeal comprising Justices Basten, Leeming and Payne corrected that error finding that the carriage was carriage to which the *Carriers Liability Act* applied (it being carriage of a kind which, if it were international, would have been within the Warsaw System) and that the deceased passenger was a passenger within the meaning of the Warsaw System.

The reasoning to both conclusions reflected the Court's experience and expertise in Warsaw System law.

A further issue that arose was whether the claims by the three family members for nervous shock were claims which were precluded by the exclusivity provisions of the Warsaw

⁸ *Stephenson & Ors v Parkes Shire Council & Ors* [2014] NSWSC 1758; [2015] NSWSC 719.

System; or whether they were able to be brought because the exclusivity provision did not operate to preclude them.

On that question the Court of Appeal divided. Justice Basten with the concurrence of Justice Payne found that the Warsaw System exclusivity operated to preclude the nervous shock claims. Justice Leeming disagreed. The reasoning to both conclusions reflected a deep understanding of Warsaw System law and of the development of the law of exclusivity that I have described. Justice Leeming came to the conclusion that he did much influenced by the reasoning of the Full Federal Court in *Magnus v South Pacific Air Motive*.⁹

In the High Court in *Parkes Shire Council* Justice Basten's reasoning was preferred and the reasoning of the Federal Court in *South Pacific Air Motive* was disapproved.¹⁰

As was demonstrated by that finding, a particular and acute weakness in Australia's infrastructure for dealing with Warsaw System claims is the present role of the Federal Court.

As best as I can tell, since that Court was established in 1977 there have been a total of six proceedings brought in it making some form of claim under the Warsaw System and resulting in a judgment.¹¹ Those proceedings have resulted in three appeals to the Full Court.¹²

As best as I can tell, only one Judge of the Federal Court, Justice Stewart, has heard and determined more than one Warsaw System claim. His Honour has heard and determined two. As it happens his Honour's reasons for decision in one of those proceedings are the focus of my address tonight.

In *DHI 22 v Qatar Airways Group QCSC (No 1)*¹³ the Full Court of the Federal Court dealt with a claim by five passengers for assaults alleged to have occurred at the hand of Qatari law enforcement officials during an investigation of an attempted murder at Hamad International Airport.

The five applicants were each in transit in Doha. In each case their final leg was Doha to Sydney. The flight to Sydney had pushed back and was then required to return to the gate with female passengers compulsorily offloaded with most subjected to compulsory physical examinations.

At first instance Justice Halley summarily dismissed the claims against Qatar Airways on the basis that the accidents giving rise to the alleged injuries did not occur on board the aircraft or in the course of embarkation or disembarkation and therefore did not fall within the scope of

⁹ (1998) 87 FCR 301; Justice Leeming had been (unsuccessful) counsel in the case.

¹⁰ (2019) 266 CLR 212 at 216 [35]

¹¹ *DHI22 v Qatar Airways Group QCSC (No 2)* [2024] FCA 348; *Bradshaw v Emirates* [2021] FCA 1407; *Grueff v Virgin Australia Airlines Pty Limited* [2021] FCA 501; *Gibson v Malaysian Airlines System Berhad* [2019] FCA 1399; *Qantas Airways Limited v Lustig* [2015] FCA 253; *Magnus v South Pacific Air Motive Pty Ltd* [2001] FCA 465.

¹² *DHI22 v Qatar Airways Group QCSC (No 1)* [2025] FCAFC 91; 310 FCR 361, *Dyczynski v Gibson* [2020] FCAFC 120; 280 FCR 583 and *South Pacific Air Motive*. While the background to the decision in *Dyczynski v Gibson* was a class action under the Warsaw System the Full Court's reasons do not address the Warsaw System but concern improper conduct in the obtaining of approval of the class action settlement to the detriment of a class member.

¹³ [2025] FCAFC 91; 310 FCR 361.

liability created by Art. 17 of the 1999 Montreal Convention which governed carriage in that case.

Further, Justice Halley held that the effect of Art. 29 of the 1999 Montreal Convention was to exclude all claims, other than those under Art. 17, for injuries arising from events which occurred in the course of international carriage, that the events alleged had so occurred and therefore there was no remedy available against the airline.

On appeal Justice Stewart, with the agreement of Chief Justice Mortimer and Justice Stellios, found that Justice Halley was wrong to summarily dismiss the claims.

I do not comment on that ultimate finding.

In the course of that finding, however, Justice Stewart construed Art. 29 of the 1999 Montreal Convention as having the same temporal scope as Art. 17: that it excluded only claims for injuries arising from an accident that occurs “on board the aircraft or in the course of any of the operations of embarking or disembarking”.

In what I am about to say I do not suggest that his Honour’s construction of Art. 29 is necessarily wrong. That will be for others to decide.

The central point that I wish to make is that the basis of his Honour’s reasoning to that conclusion demonstrates serious deficiencies in the Court’s understanding of the background and purposes of the Warsaw System.

In my view, there are four clear errors in His Honours approach.

First, his Honour frames the issues that arise under the Warsaw System as being issues concerning passengers’ claims against airlines.

That is not the scope or focus of the Warsaw System. The Warsaw System is concerned with a carrier’s liability for injuries to passengers and loss or damage to cargo or baggage and delay caused to passengers, cargo or baggage.

Further, one of the clarifications made in the rewording of Art. 29 of the 1999 Montreal Convention as compared to Art. 24 of the Warsaw Convention was to make clear that the basis of exclusivity as articulated in Art. 29 applied equally to claims concerning carriage of passengers, baggage and cargo.

Justice Stewart’s reasoning takes no account of the text of Art. 29 extending to cargo and baggage.

Clearly enough the temporal scope of liability under Art. 17 for death or injury to passengers can have no application to claims, or the exclusivity of claims, for damage to cargo.

Importantly for the consideration of the scope of exclusivity of personal injury claims, the scope of an airline’s liability for loss of, or damage to, cargo is defined by Art. 18 as being “upon condition only that the event which caused the damage so sustained took place during the carriage by air”.

Justice Stewart rejected the criterion of international carriage by air as the temporal scope of exclusivity for passenger claims. In doing so he criticised the concept of “carriage by air” as imprecise and therefore unsuitable as a criterion for exclusivity. That criticism cannot be

sustained given that phrase expressly defines the scope of liability for, and exclusivity of, cargo claims.

It is also a criticism that is inconsistent with the foundational law of the Warsaw System.

In the first decade of the Warsaw Convention Lord Greene wrote his seminal judgement in *Grein v Imperial Airways Limited*¹⁴:

“The object of the Convention is stated to be “the unification of certain rules relating to international carriage by air”. By “unification of certain rules” is clearly meant “the adoption of certain uniform rules”. That is to say, rules which will be applied by the Courts of the High Contracting Parties in all matters where contracts of international carriage by air come into question. The rules laid down are in effect an international code declaring the rights and liabilities of the parties to contracts of international carriage by air ...

The desirability of such an international code for air carriage is apparent. Without it questions of great difficulty as to the law applicable to a contract of international carriage by air would constantly arise. ...

The definition of “international carriage” is contained in paragraphs 2 and 3 of Art. 1. Paragraph 2 at the outset begins the definition by reference to the contract itself. This indeed is what would be expected seeing that the Convention lays down rules governing terms and operation of contracts of carriage which will be enforced in the Courts of the High Contracting Parties. **The rules are rules relating not to journeys, not to flights, not to parts of journeys, but to carriage performed under one contract of carriage.**

Justice Stewart’s reasoning fails to engage with that conceptual framework – which has not been questioned in the 87 years since Lord Greene wrote.

Secondly, his Honour’s analysis of the cases and of the text and purpose of the Warsaw System fails to account for the intricate regulation of the liability of carriers engaged in multi-stage trips. His Honour identifies from a series of cases, all but one of which were concerned with single stage flights, a temporal scope for operation of the liability provisions of the Convention starting with the commencement of embarkation at the port of departure and ending with completion of disembarkation at the port of arrival.

That is of little assistance in identifying the scope and operation of the Warsaw System at transit airports.

Art. 1(3) of the 1999 Montreal Convention, like Art. 1(3) of the Warsaw Convention, provides for carriage to be performed by several successive carriers to be deemed to be one undivided carriage if it is regarded by the parties to the contract as a single operation.

It is impossible for an episode of one undivided carriage within the meaning of Art. 1(3) to be bounded by the processes of embarkation and disembarkation of the first flight.

¹⁴ [1937] 1 KB 50.

It must be correct that an episode of international carriage by air commences at the point of the first embarkation and ends at the conclusion of the last disembarkation.

When a passenger transits from carriage by one carrier to carriage by another carrier during a single episode of undivided carriage within the meaning of Art. 1(3) it is inconsistent with Art 1(3) to treat the transit as falling outside the scope of that single episode of international carriage by air and therefore somewhat artificial to treat the transit as outside the phrase “in the carriage of passengers” within the meaning of Art. 29.

Thirdly, his Honour’s consideration of the transit case of *Sidhu v British Airways*¹⁵ proceeds on an incomplete understanding of the scope of the “temporal dimension” of Art. 17. In *Sidhu*, a British Airways flight from London to Kuala Lumpur via Kuwait landed in Kuwait after the Iraqi invasion in August 1990. During refuelling the passengers were in the transit lounge when taken prisoner by the Iraqi forces. The House of Lords upheld the summary dismissal of claims in negligence because they were precluded by the exclusivity of the Warsaw System. The particulars of negligence concerned the decision to land, and landing, in Kuwait when British Airways knew or should have known of the invasion and the consequent risks to the passengers.¹⁶ The House of Lords held that Mrs Sidhu’s claim fell outside the Convention and therefore she had no claim.

The critical passage of Justice Stewart’s reasoning in distinguishing the decision in *Sidhu* was:¹⁷

Whether or not the claims were ... regarded as being within the temporal scope of Art 17 was not discussed in terms, save that it was said that the alleged breaches of duty all related to decisions taken while the aircraft was in the air between London and Kuwait.

The difficulty with that reasoning is that none of the alleged breaches of duty were plausibly to be characterised as an “accident” within the meaning of Art. 17. The meaning of “accident” has been fixed since the decision of the US Supreme Court in *Air France v Saks*.¹⁸ That meaning has been approved by the Australian High Court in *Povey v Qantas Airways Ltd*.¹⁹

An accident is not any event that occurs within the time periods prescribed by Art. 17: it is an event which happened on board or during embarkation or disembarkation that caused the injury complained of, and which was unusual or unexpected.

In *Sidhu* the landing of the aircraft at its scheduled transit point was not unusual or unexpected, and the landing was not an event which caused the injuries complained of. It could not have been an accident within the meaning of Art 17. Any unexpected or unusual event that caused the injuries complained of in *Sidhu* occurred in the transit lounge upon the arrival of the Iraqi forces, and there was no need for the reasoning in *Sidhu* expressly to say so.

¹⁵ [1997] AC 430.

¹⁶ See [1997] AC at 436G, 437G.

¹⁷ At [103].

¹⁸ (1985) 470 US 392.

¹⁹ (2005) 223 CLR 189 at 204 [34] – [36].

Fourthly, his Honour based his reasoning correctly upon an understanding that the Conventions were to be given a purposive construction. However, his Honour identified the purpose of the Convention as being to provide a “remedial system designed to protect air carriers against catastrophic crippling liability by establishing monetary caps on awards and restricting the types of claims that may be brought against carriers, while accommodating the interests of injured passengers by creating a presumption of liability against the carrier when a claim satisfies the substantive requirements of the Convention”.

The purpose relied upon by Justice Stewart was identified by Justice Ginsberg in *Tseng* as being a “complementary purpose of the Convention” which her Honour distinguished from the Convention’s “cardinal purpose”.²⁰

Justice Stewart relied upon that “complementary purpose” without giving any weight to the “cardinal purpose.”

When regard is had to the cardinal purpose of achieving uniformity of rules in order to address the chaos that arises from the potential for conflict of laws questions it is liabilities that may arise at transit airports in particular where the purpose of the Convention is served by ensuring that liability arises under the uniform rules of the Convention or not at all.

Justice Stewart by way of example to illustrate his reasoning, points to a slip and fall accident by a passenger in a transit lounge of an airline and reasons that there is no justification with reference to the purpose of the Convention or its text why a passenger’s claim for such an injury should be excluded.

To the contrary, if the purpose of the Convention is regarded as its cardinal purpose to achieve uniformity in rules governing an airline’s liability in order to manage conflict of laws questions, a slip and fall in the transit lounge is a claim to which the application of uniform rules serves the Convention’s purpose.

Take two examples of passengers in a transit lounge in Doha about to board a flight to Sydney.

In the first case the passenger has bought her ticket in France from Air France. She has flown from Paris to Doha on an Air France flight, and gone to the Qatar Airways transit lounge awaiting her flight on Qatar Airways which she will undertake as a code share flight on her Air France ticket.

If she slips and falls in the lounge and brings her proceeding in France, the French Court will no doubt observe that the Warsaw System is based upon the French *contrat*,²¹ which in the case of a contract of carriage of a passenger imposes a strict liability on the carrier to complete the carriage safely, subject to the exception of *force majeure* and, possibly, fault of the passenger.

On the assumption Justice Stewart’s construction of the Conventions is correct, will the French Court recognise any room for the operation of any tort law or will it apply the French law of *Contrat* to impose liability solely on Air France? If tort law may operate, will it be the

²⁰ See 525 US 155 at 170.

²¹ Miller: *Liability in International Air Transport - The Warsaw System in Municipal Courts* (Kluwer, 1977) at pages 8-9, 12-14; *Block v Compagnie Air France* (1967) 386 F 2d 323 at 330 to 335 (5th Circuit).

tort law of France or Qatar? What will be the effect of any disclaimer notice posted by Qatar Airways at the entry to the lounge? Will tort law operate to make an airline liable or will liability fix upon the owner, or maintainer or cleaner of the lounge? Which law system will be the source of rules to answer those questions? How will the passenger, in Paris, go about locating any entity other than the airline that may be liable?

Take as the second example a passenger who purchased her Sydney to London return ticket from Virgin Australia. She has flown from London to Doha on a Qatar Airways flight as a code share on her Virgin ticket. She will fly to Sydney on a Virgin flight operated by a Qatar Airways aircraft and crew, and in transit has gone to the Qatar Airways transit lounge.

If she sues in Sydney for a slip and fall in the transit lounge, Australian law will apply Qatari tort law.

Now assume the Virgin tariff contains an exclusion of all liabilities, other than those imposed by the Conventions, in favour of Virgin and each of its codeshare partners and an indemnity in favour of any codeshare partner for any amount the partner is found liable to pay. Will Australian law recognise and enforce that exclusion and indemnity, or would Art.26 of the 1999 Montreal Convention be read as invalidating that exclusion?

If Art. 26 would invalidate the exclusion, how is the Convention to be read coherently when the effect of Justice Stewart's reasoning would then be that it does not regulate liabilities of carriers that arise at transit airports other than to prohibit the carrier from contracting to exclude or limit them?

Would Australian Consumer law apply to regulate the standards of service required of Qatar Airways in its lounge in Doha in the postulated example? What is the juridical basis for that to occur when Qatar Airways has played no role in the commercial dealings with the passenger and its only role in the carriage came to an end when she disembarked in Doha?

It is trite that the acute sensitivities of conflict of laws questions in international transit – highlighted by those and many other questions - resulted in the supplementation of the Warsaw System by the Guadalajara Convention. That Convention by Art. 2 expressly contemplates that the carriage as agreed for the purposes of Art. 1 of the Warsaw Convention is “contracted carriage” while part only of “contracted carriage” may be performed by a particular carrier, that part being “actual carriage.” It regulates the detail of the relationships of the passenger, or cargo consignor and consignee on the one hand, and each of the carriers on the other consistently with the other elements of the Warsaw System.

The system of the Guadalajara Convention providing for contracted carriers and actual carriers, and for the whole or any part of the contracted carriage to be performed by an actual carrier different from the contracted carrier, is in significant tension with the foundation of Justice Stewart's reasoning which rejects the episode of international carriage by air as the unit upon which the liability rules of the Convention operate.

It seems that the Court's attention was not drawn to the decision of the Hong Kong Court of Appeal in *Ong v Malaysian Airline System Berhad*.²² Not only is the result in that case impossible to reconcile with the result in *DHI22*, the reasoning serves to demonstrate the

²² [2008] HKCA 88.

failure by the Australian Court to engage with the foundational design features of the Warsaw System. Master Ong suffered significant brain injuries when he fainted, striking his head on the floor, while waiting in the immigration queue at Hong Kong airport having disembarked from a Malaysian Airlines flight from Kuala Lumpur. He sued under the contract of carriage constituted by his ticket with Malaysian. The Court having considered the decision in *Sidhu* and numerous other of the cases considered in *DHI22*, and addressing some factual complexities arising from Master Ong travelling on a return ticket when the return leg was not to be flown, concluded that Art. 29 of the Convention operated at least to preclude any claim based upon the contract of international carriage.

Similarly, the oft cited decision of a 5 judge Court of Appeal in New Zealand in *Emery Air Freight Corporation v Nerine Nurseries Ltd*²³ cannot readily be reconciled with the result in *DHI22*. That case concerned the liability of successive carriers of cargo. The Court found that no claim could be brought in bailment against a carrier for damage to cargo in the course of international carriage when the carrier was not liable under the Warsaw System provisions. That is, the temporal scope of exclusivity in cargo claims (at least when there is a series of carriers) is wider than the temporal scope of carrier liability.

The example of *DHI22* demonstrates that Australian aviation lawyers need to remain vigilant in seeking to educate the courts before which Warsaw System claims are made not simply on the issues that immediately arise – but on the background, history and purpose of the system and of the deep, rich and extensive jurisprudence that informs its modern operation.

That vigilance needs to extend to seeking to ensure that the coherence of the Warsaw System as a uniform set of rules governing the liability of carriers for not only passenger but also cargo and baggage claims is maintained.

The need for vigilance – and extra work in preparing cases – is likely to continue with the evident trend of claims being commenced in the Federal Court while that Court travels through a learning process travelled by other courts some time ago.

²³ [1997] 3 NZLR 723.