SHORT PARTICULARS OF CASES
APPEALS

CANBERRA
NOVEMBER 2018

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DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 2017
(M129/2018)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2018] VSCA 69

Date of judgment: 23 March 2018

Date special leave granted: 15 August 2018

On 18 July 2015, the accused was charged with the murder of her de facto partner. The Crown case was that the pair had engaged in a heated argument during which she struck the deceased to the back of the head with a wooden footstool. The accused's trial began in the Supreme Court of Victoria on 15 November 2016, before Lasry J and a jury. She pleaded not guilty, on the basis that she was acting in self-defence. She relied on the deceased's record of more than 25 years of extreme violence towards her.

On 22 November 2016 the prosecutor closed the Crown case. Counsel for the accused immediately asked the judge to give the jury a '*Prasad* direction'. After hearing submissions from the prosecutor, who opposed the giving of such a direction, his Honour ruled that the case, in his opinion, was so tenuous as to warrant informing the jury of their right to acquit, without hearing further evidence. He informed the jury that as they had heard the whole of the Crown case, they now had three choices. They could: (a) deliver verdicts of 'not guilty' to both murder and manslaughter, (b) deliver a verdict of 'not guilty' to murder and hear more evidence in respect of the charge of manslaughter, or (c) indicate that they wish to hear more evidence in respect of both charges. The jury deliberated for about half an hour before informing the judge that they wished to hear more evidence in respect of both charges. The trial then continued with the accused giving sworn evidence, and being cross-examined. On 24 November 2016, counsel closed the defence case. Immediately thereafter and prior to closing addresses, the judge reminded the jury of the continuing operation of the *Prasad* direction that he had given them two days earlier. He then provided the jury with the opportunity to revisit their earlier decision. After a short deliberation, they acquitted the accused of both murder and manslaughter.

The Director of Public Prosecutions brought a reference to the Court of Appeal pursuant to s 308 of the *Criminal Procedure Act 2009* (Vic). He submitted that a *Prasad* direction is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person. The Director relied primarily upon English authorities, such as *R v Collins* [2007] EWCA Crim 854, which, he submitted, had not merely deprecated the continued use of the practice, but had effectively determined that it was now contrary to law. He further contended that even if it was to be assumed that *Prasad* had been correctly decided, legislative provisions in the *Criminal Procedure Act 2009* (Vic) and/or the *Jury Directions Act 2015* (Vic) had the effect of abrogating its continuing validity.

After examining the English authorities, the majority of the Court of Appeal (Beach & Weinberg JJA) concluded that they did not support the Director's submissions. Their Honours accepted the submission of the acquitted person that the English authorities should be seen in context, and against the background of

the very different approach to directed acquittals applicable in that country. They concluded that there was no reason, in principle, why trial judges should not continue to give appropriately worded *Prasad* directions, provided that it was understood that they are to be given only rarely, and where the circumstances made it proper to do so. Before giving such a direction, the trial judge must form the view that the prosecution case, considered as a whole, though sufficient to be left to the jury, was particularly weak. The case must be one where the jury would be able, without the assistance of closing addresses, still less a full judicial charge, to make a sensible assessment of whether, without hearing further evidence, an acquittal was the just and appropriate verdict. The majority further found that the Director's submission, that the provisions of the *Criminal Procedure Act* and/or the *Jury Directions Act* were inconsistent with the continued use of a *Prasad* direction, was strained and unconvincing.

Maxwell P (dissenting) found that the reasons given by the English Court of Criminal Appeal in *Collins* and *R v Speechley* [2004] EWCA Crim 3067 for disapproving this practice were cogent and compelling, and a survey of Australian decisions demonstrated that those criticisms applied with equal force here. He would have answered the point of law as follows: Although the direction commonly referred to as the '*Prasad* direction' is not contrary to law, such a direction should no longer be administered to a jury determining a criminal trial between the Crown and an accused person.

The ground of appeal is:

- The Supreme Court of Victoria (Court of Appeal) erred in determining on the reference:
  (a) that the giving of a *Prasad* direction is not contrary to law; and/or
  (b) that the giving of a *Prasad* direction may continue to be administered to a jury determining a criminal trial between the Crown and an accused person.

THE REPUBLIC OF NAURU v WET040 (M154/2017)

Court appealed from: Supreme Court of Nauru [2017] NRSC 79

Date of judgment: 28 September 2017

The respondent is an Iranian citizen who left Iran for Malaysia in June 2013. From there he travelled to Indonesia where he boarded a boat for Australia, arriving on Christmas Island on 6 August 2013. He was transferred to Nauru on 25 January 2014. The respondent claimed a fear of harm from his wife's family as a result of the breakdown of his marriage and his refusal to follow strict Islamic teachings. He further claimed a fear of harm based on his lack of belief in Islam; his ethnicity as an Azeri Turk; and his membership of the particular social group of failed asylum seekers.

The Secretary of the Nauru Department of Justice and Border Control found that the respondent had no well-founded fear of persecution. The Secretary further considered that there was no evidence to indicate a reasonable possibility of the respondent facing harm if returned to Iran that would breach Nauru's international obligations. He was not, therefore, granted refugee status. The respondent made an application for merits review of that decision to the Refugee Status Review Tribunal. The Tribunal affirmed the decision of the Secretary.

The Tribunal was not satisfied as to the credibility of key parts of the respondent's evidence concerning the attitude of his wife's family toward him. It did not accept there was any credible evidence that the respondent's wife's family ever took action to physically harm him or that they sought to go outside the sphere of the courts to seek restitution from him; that after he left Iran threats were made to his sister or other members of his family that he would be killed or that they themselves would be killed or harmed if he could not be found; or that there was any credible basis for his claim that he would be killed or harmed by his wife's family, or those acting for them if he were to be returned to Iran.

The respondent appealed to the Supreme Court of Nauru (Crulci J). He contended that the Tribunal made errors of law by finding that certain of his allegations were implausible without any rational basis or evidentiary basis for such findings.

Crulci J noted that Australian authorities indicated that when a Tribunal is making a credibility finding, a bare assertion that a claimed event is "implausible" will only stand if the event is "inherently unlikely" or "inherently improbable" or "far out of accord with what was likely to occur". Absent this, the Tribunal must point to "basic inconsistencies" in the evidence, or "probative material" or "independent country information", which led the Tribunal to conclude that the claimed event was "implausible". The reasoning process and supporting evidence that forms the basis on which a finding that evidence was rejected should be disclosed and clear findings made in direct and explicit terms. It was not sufficient simply to make general passing comments on general impressions made by the evidence where the issue was important or significant.

Her Honour examined three key findings of implausibility made by the Tribunal: firstly, that it was implausible that an attack on a car jointly owned by the respondent and his wife could have been intended to prevent them from

divorcing; second, it was implausible that, if the police had gone to the trouble of visiting the respondent's house to report an incident involving an unknown perpetrator, they would ignore evidence of the perpetrator's identity and confession on the grounds that the means by which he had discovered it did not constitute legal proof; and third, it was implausible that the wife's brother would have sought out a relationship with the respondent's sister with the purpose of preventing the respondent from divorcing his wife.

Crulci J found that the findings of implausibility made by the Tribunal were not supported by inconsistencies in the respondent's evidence, or probative material or independent country information. The findings were speculative and matters of conjecture. Her Honour was not satisfied that the cumulative weight of the findings made by the Tribunal supported by a rational basis was sufficient to permit the Tribunal to reach the conclusion that the respondent's claims were fabricated. Her Honour allowed the appeal and remitted the matter to the Tribunal for reconsideration.

The Republic filed a notice of appeal as of right in this Court. The notice of appeal was filed one day out of time and the Republic has, by summons, sought an extension of time. The respondent has not filed an appearance or taken part in the appeal.

The ground of the appeal is:

- The Supreme Court of Nauru erred in concluding that the Tribunal had made errors of law by making findings to the effect that certain of the respondent's factual allegations or conjectures were "implausible", and thereby quashing the Tribunal's decision.

In recent months Refugee Legal has sought leave to appear as amicus curiae to assist the Court and has raised the issue as to whether the extension of time sought is able to be granted.

TTY167 v REPUBLIC OF NAURU (S46/2018)

Court appealed from: Supreme Court of Nauru
[2018] NRSC 4

Date of judgment: 20 February 2018

The Appellant is a national of Bangladesh. He is a Sunni Muslim of Bengali ethnicity. After arriving in Australia by sea in August 2013, in July 2014 the Appellant was transferred to Nauru. There he applied for a determination that he was a refugee or alternatively that he was owed complementary protection. That was on three bases: his political opinion (because he was both an active supporter of the movement Jamaat-e-Islami and personally opposed to the ruling Awami League in Bangladesh), his religion and as a member of a particular social group (failed asylum seekers who had left Bangladesh illegally).

On 9 October 2015 the Secretary of the Nauruan Department of Justice and Border Control ("the Secretary") determined that the Appellant was not a refugee within the meaning of the *Refugees Convention Act* 2012 (Nauru) ("the Refugees Convention Act") and that he was not owed complementary protection by Nauru.

The Appellant applied for a review of the Secretary's decision by the Refugee Status Review Tribunal ("the Tribunal"). The Appellant filed a statement of evidence with the Tribunal and his lawyer provided written submissions on his behalf. He did not appear at the hearing scheduled by the Tribunal however. The Tribunal proceeded to determine the review, giving its decision two months later. That decision affirmed the determination of the Secretary.

The Appellant appealed to the Supreme Court of Nauru. In that proceeding he represented himself. He did not file written submissions and he said little during the hearing. The Appellant relied on two grounds of appeal. The first was that the Tribunal had unfairly failed to adjourn the hearing, in circumstances where he had been feeling unwell and very stressed and had instructed his lawyer to obtain an adjournment. The Appellant's second ground of appeal was that the Tribunal had been unreasonable and biased against him.

Judge Marshall dismissed the appeal and affirmed the decision of the Tribunal. His Honour held that in the absence of a request for the hearing to be rescheduled, which could have been made at any time prior to the Tribunal's giving of its decision, the Tribunal was entitled to proceed under s 41(1) of the Refugees Convention Act and determine the review without taking steps to enable the Appellant to appear. Judge Marshall also held that the Tribunal's decision was not unreasonable. His Honour found no evidence to support a contention of either actual bias or a reasonable apprehension that the Tribunal was not open to persuasion on some matters before it.

The Appellant seeks an extension of time in which to appeal to the High Court, invoking its jurisdiction to hear and determine appeals from the Supreme Court of Nauru by virtue of s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth) and Article 1A(b)(i) of an agreement between the governments of Australia and Nauru relating to such appeals that was signed on 6 September 1976 (and came to an end on 13 March 2018).

The grounds of appeal are:

- The Supreme Court of Nauru erred in failing to find that the Tribunal made an error of law by exercising its powers under s 41(1) of the Refugees Convention Act to decide the application after the Appellant failed to attend the hearing without convening a further hearing in circumstances where the Appellant had not been invited to appear at that hearing, in breach of s 40 of that Act.

- The Tribunal acted unreasonably in exercising its powers under s 41(1) of the Refugees Convention Act, in circumstances where it:
  a) did not provide notice to the Appellant of the hearing date;
  b) had prior notice of the Appellant's mental health concerns;
  c) had prior notice of the Appellant's desire to give evidence before the Tribunal;
  d) did not make any inquiries as to the Appellant's failure to appear before it; and
  e) relied on findings of adverse credibility and lack of detail in the previous evidence given by the Appellant.

TJUNGARRAYI & ORS v STATE OF WESTERN AUSTRALIA & ORS (P37/2018)

Court appealed from: Full Court, Federal Court of Australia [2018] FCAFC 35

Date of judgment: 16 March 2018

Date special leave granted: 21 June 2018

KN (DECEASED) AND OTHERS ON BEHALF OF THE TJIWARL AND TJIWARL#2 v STATE OF WESTERN AUSTRALIA & ORS (P38/2018)

Court appealed from: Full Court, Federal Court of Australia [2018] FCAFC 8

Date of judgment: 1 February 2018

Date special leave granted: 21 June 2018

These appeals arise from two native titles claims in Western Australia. The issue raised in P37/2018 ("*Tjungarrayi*") is whether a petroleum exploration permit granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) ("the *Petroleum Act*") is a "lease" within s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth) ("the NTA"). If it is a "lease", then s 47B(2) of the NTA, requiring prior extinguishment of native title to be disregarded, cannot operate. P38/2018 ("*Tjiwarl*") raises the same issue in relation to a mineral exploration licence granted under the *Mining Act 1978* (WA).

In *Tjiwarl* the first respondent ("the State") submitted that the definition of "lease" in s 242 of the NT Act included licences and authorities to mine. Relying on the definition of "mine" in s 253 of the NTA, it further submitted that a mining exploration licence is a "lease" for the purposes of the NTA. Mortimer J did not accept that submission, as she considered that it did not give effect to the text of s 242(2). Her Honour held that the NTA defines a mining lease narrowly. It looks to the use of the land, and requires that the land be used "solely" or "primarily" for mining. As there was no evidence in this case that the exploration licences permitted the licensee to use the land or waters they covered "solely" or "primarily" for mining, they were not leases within s 47B(l)(b)(i).

The Full Federal Court (North, Dowsett & Jagot JJ) disagreed. They considered that the scheme established by Div 3 of Pt 15 of the NTA was clear. There was no reason not to give the word "mining", wherever it appeared in Div 3, the meaning given to "mine" by s 253, which included "to explore or prospect for things that may be mined". Accordingly, when s 245 referred to a mining lease being a lease that permits land to be used solely or primarily for the purpose of "mining", the word "mining" was to be given the same meaning as "mine" in s 253. As a result, a lease that permitted the lessee to use land solely or primarily for exploring or prospecting for things that may be mined was a lease that permitted use of the land solely or primarily for mining. Further, to work out what "lease" and "lessee" meant in s 245, the answers were to be found in s 242(2) (references to "mining lease" include a licence issued or authority given) and s 243(2) (in the case of a lease that is a mining lease because of s 242(2), the expression lessee means

the person to whom the licence was issued or authority given and their successors).

The Full Court considered that the contrary arguments did not confront the plain words of the statutory scheme. The legislative intention to treat all licences and authorities to mine as leases for the purpose of the NTA was evident from that scheme, as was the legislative intention to treat the concept of a "mine" or "mining" as encompassing exploring or prospecting for things to mine. This legislative intention was supported by the extrinsic material, in particular, the *Supplementary Explanatory Memorandum, Native Title Bill 1993* (Cth).

In *Tjungarrayi*, the first respondent made similar submissions in relation to petroleum exploration permits. Barker J considered that the analysis provided by Mortimer J in Tjiwarl was not clearly wrong and that he should apply it, with the result that the petroleum exploration permits did not constitute a "lease" for the purposes of s 47B(1)(b)(i).

The State's appeal to the Full Court (North, Jagot & Rangiah JJ) was heard after the Full Court handed down its decision in *Tjiwarl*. The State contended that *Tjiwarl* decided all issues with the consequence that the appeals should be allowed. The Full Court found that *Tjiwarl* correctly reflected the scheme of the NTA. The same reasoning that applied to mineral exploration licences in that case had to be applied to the petroleum exploration permits in *Tjungarrayi*. The Court noted that in s 253 of the NTA, "mine" is also defined to include, "extract petroleum or gas from land or from the bed or subsoil under waters". Thus, sub-paragraph (a) of the definition, which refers to "explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c))", meant that a permit to explore for petroleum is a mining lease if that instrument permits the land to be used solely or primarily for exploring the land for petroleum. The petroleum exploration permits satisfied this requirement because, being grants under s 38(1) of the *Petroleum Act*, they permitted the holder "subject to this Act and in accordance with the conditions to which the permit is subject, to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area".

The ground of appeal in P37/2018 (*Tjungarrayi*) is:

- The Full Court erred in holding that each of petroleum exploration permit EP 451 and EP 477 granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) is a "lease" within s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth).

The ground of appeal in P38/2018 (*Tjiwarl*) is:

- The Full Court erred in holding that exploration licence E57/676 granted under the *Mining Act 1978* (WA) is a "lease" within s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth).

RINEHART & ANOR v HANCOCK PROSPECTING PTY LTD (S143/2018)
RINEHART & ANOR v GEORGINA HOPE RINEHART (IN HER PERSONAL CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST) & ORS (S144/2018)

Court appealed from:	Full Court of the Federal Court of Australia [2017] FCAFC 170 [2017] FCAFC 208
Dates of judgment:	27 October 2017 15 December 2017
Special leave granted:	18 May 2018

In October 2014 the Appellants, Ms Bianca Rinehart and Mr John Hancock, commenced Federal Court proceedings against their mother, Mrs Georgina Rinehart ("Mrs Rinehart"), Hancock Prospecting Pty Ltd ("HPPL") and other persons and companies. In those proceedings, the Appellants allege various forms of misconduct by Mrs Rinehart in the administration of trusts of which the Appellants are beneficiaries. The Appellants also impugn, on the basis of alleged wrongdoing by Mrs Rinehart and HPPL, a series of deeds that were entered into by one or both of the Appellants with various of the respondents in the proceedings between 2003 and 2010. The deeds contain releases and covenants not to sue. Each deed also contains a provision that the parties to the deed are to resolve any dispute by confidential arbitration (those provisions together, "Arbitration Agreements").

A group of respondents ("the HPPL Respondents") applied for the Federal Court proceedings to be stayed, contending that by executing the deeds the Appellants had given up any rights to bring such proceedings and that the claims were to be resolved by confidential arbitration. In support of their application, they relied on s 8(1) of the *Commercial Arbitration Act 2010* (NSW) ("the NSW Act") or alternatively the identical s 8(1) of the *Commercial Arbitration Act 2012* (WA) ("the WA Act"), in conjunction with the Arbitration Agreements. The Arbitration Agreements variously identified "all disputes hereunder" (in one deed), "any dispute under this deed" (in two of the deeds), and "[a]ny dispute or claim arising out of or in relation to this Deed" (in two of the deeds). Mrs Rinehart (along with one of the respondent companies) made a similar application, seeking that the proceedings be dismissed or permanently stayed and that the parties be referred to arbitration.

On 26 May 2016 Justice Gleeson ordered a separate trial of the question whether any of the Arbitration Agreements was null and void, inoperative or incapable of being performed within the meaning of s 8(1) of the NSW Act or the WA Act. This was after her Honour had held that various matters in dispute did not fall within the scope of an apparently valid arbitration agreement. Those matters included the very validity of the Arbitration Agreements and of certain deeds themselves (on grounds that included the non-disclosure of material information and a lack of negotiation at arms' length). Her Honour considered that certain claims by the

Appellants could, if successful, lead to a finding that each of the Arbitration Agreements was void or inoperative.

The HPPL Respondents appealed, as did Mrs Rinehart.

The Full Court of the Federal Court (Allsop CJ, Besanko and O'Callaghan JJ) unanimously allowed both appeals and set aside the orders made by Justice Gleeson. The Full Court held that the respective contexts of the relevant deeds, which involved the quelling of disputes about title to valuable mining assets, tended to widen the deeds' operation. Though the meaning of the phrase "any dispute under this deed" was narrower than the meaning of "a dispute in connection with this deed", the former phrase was nevertheless to be read liberally so as to encompass any dispute framed by a claim that was met by pleading the deed. Such a dispute included the Appellants' impugning of the deeds' validity. Their Honours held that Justice Gleeson had erred by finding that the Appellants' respective claims impugned the Arbitration Agreements as distinct from the deeds containing them. The Appellants' claims of invalidity were for the most part directed at the deeds rather than at particular arbitration agreements within them. The Full Court then stayed the Federal Court proceedings, pending arbitration.

In each appeal, the ground of appeal is:

- The Full Court erred in:
    1) finding that the arbitration clauses in cl 14 of the 2005 Deed of Obligation and Release, cl 20.2 of the Hope Downs Deed and cl 9.2 of the 2007 HD Deed extend beyond disputes, the outcomes of which would be governed or controlled by those Deeds, to cover disputes concerning the validity of those Deeds or provisions thereof (reasons of the Full Court [193]); and
    2) failing to find that the claims for relief advanced in prayers 35 to 41 of the applicants' Originating Application dated 31 October 2014 were not matters the subject of apparently valid arbitration agreements.

In appeal S143/2018, the Sixth to Eighth Respondents (three of the companies among the HPPL Respondents) have filed a summons seeking leave to file a notice of cross-appeal out of time. The proposed ground of cross-appeal relates to a finding by the Full Court that the Sixth to Eighth Respondents were not parties within the meaning of the NSW Act because they were not "claiming through or under" a party to certain of the Arbitration Agreements and therefore they were not entitled to seek an order under s 8(1) of the NSW Act.

In respect of both appeals, Wright Prospecting Pty Ltd has applied for leave to intervene and the Australian Centre for International Commercial Arbitration Limited has applied for leave to be heard as *amicus curiae*.

PARKES SHIRE COUNCIL v SOUTH WEST HELICOPTERS PTY LTD (S140/2018)

Court appealed from: New South Wales Court of Appeal
[2017] NSWCA 312

Date of judgment: 7 December 2017

Special leave granted: 18 May 2018

In 2006 Parkes Shire Council ("Parkes") engaged South West Helicopters Pty Ltd ("South West") to provide a helicopter and a pilot for an aerial noxious weed survey. The pilot, Mr Shane Thrupp, was an employee of South West, the helicopter itself was owned by Country Connection Airlines Pty Ltd ("Country Connection"), while two of Parkes' employees, Mr Ian Stephenson and Mr Malcolm Buerckner were on board to conduct the survey. On 2 February 2006 the helicopter struck a power line owned by Essential Energy and crashed, killing all three men. The helicopter was destroyed.

The accident led to a number of claims and cross-claims. Mr Stephenson's family commenced three sets of proceedings to which Essential Energy was also joined. Parkes commenced proceedings against South West, seeking to recover workers' compensation payments made to the families of its two employees. South West then cross-claimed against Essential Energy, and both Essential Energy and South West cross-claimed against Parkes. South West and Country Connection also brought a proceeding against Essential Energy in damages for loss of the helicopter, while Essential Energy cross-claimed against Parkes.

The complex nature of the proceedings resulted in four judgments, with final orders being made by Justice Bellew on 12 August 2016. This then led to appeals by each of: South West / Country Connection, Essential Energy and Parkes. On 7 December 2017 the Court of Appeal (Basten, Leeming and Payne JJA) allowed the appeals of South West / Country Connection and Essential Energy, but dismissed that of Parkes.

Justices Basten and Payne held that the key provisions in s 35 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the Act"), governing a carrier's liability in respect of the death of a passenger (such as Mr Stephenson), should, where possible, conform to the operation of the *Warsaw Convention of 1929* ("the Convention"). Their Honours held that s 28 of the Act, which renders the carrier liable "for damage sustained by reason of the death of the passenger", is not limited to damage sustained by the deceased passenger, as s 35(3) provides that "the liability is enforceable for the benefit of such of the passenger's family members as sustained damage by reason of his death". "Damage" is also not limited to financial or economic loss.

Section 35(2) of the Act provides that liability of the carrier "is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger". Justices Basten and Payne held that the reference to liability under any other law is not limited to tortious forms of liability, but includes such liability. The Convention "imposes an event-based liability on the carrier", which is intended to be exclusive of all other remedies available to a moving party seeking relief in connection with injury or death covered by the Convention.

The majority held that to treat the operation of s 35 (relating to death) and s 36 (relating to personal injury) of the Act as having analogous operations, is to disregard both the subject matter of the claim and the differential language of the Convention and the statute.

Justices Basten and Payne found that the salient event here was the death of an aircraft passenger in the course of carriage by air. In the context of the Convention and the purposes of the Act, the claims of the family in respect of nervous shock were claims "in respect of" the death of Mr Stephenson. It followed therefore that they were excluded by s 35(2) of the Act and they should have been dismissed.

The grounds of appeal are:

- The Court of Appeal erred in its construction of s 35 of the Act.

- The Court should have held that claims for psychiatric injury against carriers by non-passengers following the death of a passenger are not regulated by s 35 of the Act.