Court of Appeal
Supreme Court
Sydney

Decisions of Interest

6 June 2020 – 19 June 2020

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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New South Wales Court of Appeal Decisions of Interest

Torts: damages for inconvenience

Lee v Strelnicks; Souaid v Nahas; Cassim v Nguyen; Rixon v Arsalan **[2020] NSWCA 115**

Decision date: 18 June 2020

Meagher JA, White JA, Emmett AJA

Four cars were damaged in unrelated collisions. Each car owner hired a replacement vehicle while repairs were undertaken. Each owner claimed the hire costs against the negligent drivers in the Local Court. Each case was then appealed to the Supreme Court. In most cases, the damaged car was a "prestige" vehicle whose owner hired a similar replacement. The primary judges held that a claimant could only recover the cost of a functionally equivalent vehicle, not the cost of an equivalent "prestige" vehicle. Applications for leave to appeal were brought in each case and were heard together. The question on appeal was whether the reasonable cost of hiring the replacement vehicle meant a vehicle of similar luxury and prestige, or a vehicle that performed the same functions as the damaged vehicle.

Held: granting leave and by majority allowing the appeals for two applicants who established their need for a replacement vehicle: [134], [136], refusing leave to an applicant who failed to establish she had a relevant need: [132], and refusing leave to an applicant who established his need but found he was content with any replacement vehicle: [137].

- The claimant must establish a reasonable need to hire any substitute or replacement vehicle: [11], [69], [120]. It must be established that the claimant would have used the damaged vehicle during the period of repair: [123].
- To put the claimant in the position in which he or she would have been but for the wrongdoing, the replacement vehicle should be equivalent to the damaged vehicle or as similar to it as is reasonably possible: [60], [120]. In the case of fungibles, such as motor vehicles, there will normally be no difficulty in finding a replacement that is equivalent. To the extent that a replacement is not available, there may be a question of what reasonable equivalent is available in the market place: [121].
- The claimants' loss was the deprivation of the use of the damaged vehicle, not simply deprivation of the use of a means of transportation. This was not satisfied by the provision of a replacement vehicle that might have the same function but was of different specification and performance: [129].
- In dissent, Meagher JA held that a replacement vehicle should satisfy the uses to which the damaged vehicle was capable of and likely to have been put during the period of repair, as this is what the compensation provides for: [18]. Therefore, the uses must be identified to assess the reasonableness of the claimant hiring a particular vehicle: [20].

Workers' Compensation

***Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* [2020] NSWCA 113**

Decision date: 17 June 2020

White JA, Brereton JA, Simpson AJA

Frank Hochbaum and Dianne Whitton were injured in the course of their employment with RSM Building Services and TAFE NSW, respectively. Each made a claim for compensation, and was in receipt of weekly compensation payments, before the *Workers Compensation Legislation Amendment Act 2012* (NSW) commenced. Section 39(1) provides that a worker has no entitlement to weekly payments after an aggregate period of 260 weeks of payment. However, s 39(2) provides that this section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment is more than 20%.

The respondents' insurers ceased making weekly payments to the workers from December 2017, being 260 weeks after the date from which time started accruing. Subsequently, the workers were assessed as having a degree of permanent impairment over 20%. Weekly payments were resumed with effect from the date of assessment. Liability to make payments in respect of the period between December 2017 and the date of the assessment was disputed. A Senior Arbitrator held that each worker was entitled to weekly payments for that period, but these decisions were overturned on appeal by the President of the Workers Compensation Commission. The workers brought appeals.

Held: allowing the appeal: [76].

- On the proper construction of s 39, the 260-week limit never applies to a worker whose degree of permanent impairment resulting from the relevant injury exceeds 20%, regardless of when that threshold is crossed and whether or when it is formally assessed as having been crossed: [42]. Section 39(3) does not require an assessment before s 39(2) is engaged, but points to the mechanism to be used when measuring the degree of permanent impairment and resolving any dispute about it: [47]. Removal of the s 39(1) bar is not dependent upon the date of the assessment of the degree of permanent impairment as distinct from the existence of the permanent impairment: [90]-[91].
- There can ultimately be only a single degree of *permanent* impairment that results from an injury. If a later assessment shows an improvement or deterioration in the worker's condition, the later assessment is the permanent impairment: [7]-[8]. Liability for permanent impairment dates from the injury, regardless of when it is ascertained: [52]. For the purposes of s 39, it is the final degree of *permanent* impairment that results from an injury that matters, although it may not be established until long after the injury, or the expiry of the 260 week period: [56]. A new certificate would operate from the date of injury, not from the date of its issue: [57].

Equity: tracing

Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of Courtenay House Pty Ltd (in liq) & Courtenay House Capital Trading Group Pty Ltd (in liq) (No 2) **[2020] NSWCA 117**

Decision date: 18 June 2020

Bathurst CJ, Bell P, Macfarlan JA

Courtenay House Capital Trading Group Pty Ltd and Courtenay House Pty Ltd (CH) accepted funds from investors for the ostensible purpose of investment in foreign exchange trading from about 2010, but were in actuality operating a Ponzi scheme. On 21 April 2017 the Australian Securities and Investment Commission obtained ex parte freezing orders over CH's assets and restrained CH from carrying on a financial services business. A number of investors then made investments with CH. Investors' funds were originally deposited in a bank account, co-mingling over a number of years, and there were innumerable deposits into and withdrawals from the account. The liquidators brought an application for orders and directions about the manner in which they should distribute funds. The contest was between the Pre-21 April 2017 investors represented by the respondents and Post-21 April 2017 investors represented by the appellants. The primary judge ordered that the liquidators would be justified in distributing the funds using the *pari passu* method of distribution and the appellants brought an appeal challenging these orders.

Held: allowing the appeal, setting aside the primary orders and determining that the appellants were entitled to have the funds distributed by reference to the lowest intermediate balance rule: [60], [180].

- The rule in Clayton's Case favours later investors over earlier investors, and has been rejected as an appropriate method of distributing funds amongst investors who have been defrauded or left short of funds by incompetent management: [10]. The *pari passu* approach has the merit of arithmetic simplicity and consequent ease of application, but favours earlier investors over later investors: [12]-[13]. This was the approach taken by the primary judge which would have resulted, for example, in fresh investments from 21 April 2017 being used to subsidise earlier investors who in fact had been defrauded: [165].

- The lowest intermediate balance approach is most consistent with the rules of tracing and is likely to produce the most equitable result: [14]-[15]. Where evidence is available, it is the fairest, most equitable and principled outcome for the allocation of limited funds between investors: [146]. Where a party can identify through tracing his, her or its equitable proprietary interest in a mixed or co-mingled fund, this should be permitted: [164]. This method was best calculated to do justice to the represented parties in the proceedings and the primary judge erred in favouring the *pari passu* approach: [6], [158]-[176].

- Where possible, questions of hotchpot should be determined with other questions relating to the distribution of limited funds in a mixed account: [182].

Public Assembly

Raul Bassi v Commissioner of Police (NSW) **[2020] NSWCA 109**

Decision date: 9 June 2020

Bathurst CJ, Bell P, Leeming JA

On 29 May 2020 a Notice of Intention to hold a public assembly had been given by Raul Bassi to the Commissioner of Police under s 23 of the *Summary Offences Act 1988* (NSW). The assembly was in furtherance of the Black Lives Matter cause and in particular memory of an Indigenous Australian, Mr David Dungay. It was anticipated to be a vigil of up to 50 people at Belmore Park but Mr Bassi subsequently became aware that many more were likely to convene. On 4 June 2020 a meeting was held between Mr Bassi and NSW Police in which Mr Bassi suggested that an assembly of up to 5,000 would convene at Sydney Town Hall and process to Belmore Park. Mr Bassi understood that the Commissioner agreed with this change of proposal and did not oppose the conduct of an assembly in amended form, seemingly supported by an email from the Police to Mr Bassi on 4 June 2020.

On 5 June 2020 the Commissioner commenced proceedings to prohibit the conduct of the proposed assembly. In an urgent hearing that day, the primary judge held that the Commissioner had not agreed to the assembly in amended form, and refused an application for authorisation on the basis that public health considerations associated with the COVID-19 pandemic outweighed the importance of orderly public protest. Mr Bassi brought an appeal, arguing that the primary judge erred in concluding that he had not given notice in relation to the public assembly; that the amendment had the effect that a new notice had been given; and in not granting the declaration sought to the effect that the Commissioner had notified Mr Bassi that he did not oppose the holding of a public assembly.

Held: allowing the appeal and declaring that the amended assembly was an authorised public assembly: [2].

- Mr Bassi gave a timely notice, and although the particulars of the assembly changed very significantly, the original notice did not cease to have legal efficacy and the modified notice was not a new notice: [38]. Following the 4 June meeting, an amendment of particulars of the notice was made pursuant to s 24 of the *Summary Offences Act*, which provides for the amendment of a subsisting notice: [40]. Therefore, Mr Bassi did not require authorisation under s 26, rather the Commissioner required an order prohibiting the proposed assembly under s 25: [39].

- The email containing the modified notice amounted to a communication of non-opposition, within s 23(1)(f): [42]. Following the email, the Commissioner's view changed, and he made an application to the Court: [44]. Unless the Commissioner succeeded in a s 25 application, there was an authorised public assembly: [46]. The attempt to revive the Commissioner's s 25 application was made orally within 20 minutes of the assembly commencing, when it should have been flagged at the very outset of the urgent hearing: [49], and the pre-conditions to the making of such an application had not been satisfied: [50].

Crime: extended supervision order

***Baldwin v State of New South Wales* [2020] NSWCA 112**

Decision date: 17 June 2020

Basten JA, Macfarlan JA, Emmett AJA

In 2019 an extended supervision order (ESO) for a period of two years was made with respect to Mr Baldwin by the Supreme Court, taking into account his history of sexual offending and assessing his risk of reoffending. The order contained 54 conditions which permitted significant intrusions into his liberty. Mr Baldwin brought an appeal challenging four conditions under a part labelled "search and seizure" which permitted the search and inspection/examination of Mr Baldwin's property, possessions and person; garment and pat down searches of Mr Baldwin; a requirement that Mr Baldwin consent to the seizure of anything found; and prohibiting destruction of or interference with objects searched or seized.

The grounds of appeal were that the conditions were not authorised under the *Crimes (High Risk Offenders) Act 2006* (NSW) because they abrogated Mr Baldwin's privilege against self-incrimination; they impermissibly directed or regulated third party conduct; authorised unlawful conduct in extending to the search of property not in the applicant's possession; and made compliance with a condition dependent upon a third party's state of mind.

Held: granting leave to appeal and dismissing the appeal: [68].

- It is not clear that the requirement to consent to a search purports to abrogate the privilege against self-incrimination: [24]. The conditions imposed by the ESO do not require Mr Baldwin to answer questions, to produce documents or to in some other way assist the process of investigation, and therefore the privilege is not engaged by the proper exercise of the powers conferred: [30], [55], [75].

- Section 11 of the Act provides for the conditions that may be imposed on an ESO. It demonstrates a sufficiently clear and unambiguous intention to permit the imposition of conditions that abrogate any privilege against self-incrimination. On the assumption that conditions 39 to 42 would otherwise be inconsistent with the privilege against self-incrimination, there was no error in the primary judge's conclusion: [70], [75].

- The purpose of the search and inspection condition was to require the subject of the order to consent to such search and inspection as may be directed. It will not be required unless a departmental officer forms a belief and takes steps to initiate a search. Section 11(1) requires the offender to permit an officer to visit and enter his or her residential address, and s 11(1)(a1) assumes an officer has already obtained access to the offender's premises and computer. They do not direct or regulate the officer's conduct, although they may assume that an officer has formed a particular belief or been directed to undertake a particular task: [59]. The purpose of requiring a reasonable belief was intended to be protective of Mr Baldwin's interests, by limiting the circumstances in which a search could properly be directed: [65].

Australian Intermediate Appellate Decisions of Interest

Migration: bias; Evidence: tendency and coincidence

***CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104**

Decision date: 11 June 2020

Jagot J, Yates J, Stewart J

CMU16 is a citizen of Sri Lanka who arrived in Australia in 2013 as an unauthorised maritime arrival. He lodged an application for a protection visa, claiming to fear harm in Sri Lanka on a variety of bases. The Administrative Appeals Tribunal did not accept most of the evidence about his claim to fear harm. It held that the experiences and penalties upon his return to Sri Lanka would not amount to serious harm for a reason pursuant to the *Convention relating to the Status of Refugees 1951* and concluded that he did not satisfy the refugee criteria or attract Australia's complementary protection obligations.

CMU16 applied for judicial review of the Tribunal's decision, which was dismissed. CMU16 brought an appeal against this dismissal, on grounds including actual and apprehended bias. CMU16 sought to lead evidence on the appeal concerning unrelated migration appeals from judgments of the primary judge as being relevant to actual bias, and as tendency and coincidence evidence relating to apprehended bias.

Held: dismissing the appeal: [93].

- The evidence of various unrelated decisions on appeal from the primary judge was inadmissible to prove any fact in the proceedings: [21]. The evidence could not possibly have satisfied the thresholds of relevance or significant probative value to the claimed existence of apprehended or actual bias. The issue of selectivity of the judgments presented would require the court to have conducted *de facto* appeals within an appeal involving potentially all cases in which the primary judge had decided a migration application. This was not the function of the appellate court, which was to determine the instant appeal: [43].

- Tendency and coincidence evidence can play no role in apprehended bias. Both types of evidence prove that the person **in fact** had a particular state of mind or behaved in a particular way in the present case, because of their tendency to do so or similarities between previous circumstances and the present circumstances: [30].

- If it were proved that a judge had decided several cases against immigration applicants on account of the judge's actual bias against immigration applicants, that characteristic or tendency may ground an apprehended bias case in a subsequent case, even though it did not rise so high as to ground an actual bias case: [37]. In order for the evidence of the judge's conduct in other cases to be admissible in respect of the actual bias case it must, either by itself or having regard to other evidence adduced, "have significant probative value": [40].

Legal Profession: costs agreements; uplift fees

***Carter Capner Law v Clift & Ors* [2020] QCA 125**

Decision date: 9 June 2020

Fraser JA, Philippides JA, Crow J

Carter Capner Law (CCL) is a law practice that was engaged by five former clients, the respondents, in relation to their personal injury claims. Each client signed a conditional costs agreement with CCL. Part 4 of the agreement, entitled "General care and conduct", provided for a further allowance "to reflect the solicitor's care, consideration, skill and conduct" which was to be "not less than 15% of the aggregate of all time based items performed" when the no-win no-fee arrangement applied, as was the case for the clients. It did not contain an estimate of the uplift fee nor a range of estimates which could affect its calculation, as required under the *Legal Profession Act 2007* (Qld).

The clients sought an order requiring CCL to provide a written report of the legal costs it had incurred and for a declaration that the agreements were void as they contravened the *Legal Profession Act*. The primary judge made an order for CCL to provide the clients with an itemised bill and declared that the costs agreements were void. CLL brought an appeal challenging this order and declaration.

Held: granting leave, allowing the appeal against the order for an itemised bill and dismissing the appeal against the declaration that the agreement was invalid: [65].

- The validity of a costs agreement must be assessed as at the time it was made. A costs agreement provides for payment of an uplift fee if the agreement may be performed in a way that results in the client becoming obliged to pay an uplift fee upon a successful outcome: [10].
- The legal costs to which an uplift fee may be added are those payable for the legal services if the costs agreement was not conditional. The addition of a premium to take into account that the law practice will not become entitled to payment unless and until a successful outcome is achieved is an uplift fee: [23].
- The requirement for a top-up payment where the assessed fee for care and conduct falls short of 15% is not incorporated in CCL's costs agreements where payment of its costs is not deferred or conditional. It would not be payable under a costs agreement in substantially the same form but without the conditional provision. Therefore the clause provides for the payment of an uplift fee: [29]. The primary judge's decision was upheld and the appeal against the declaration failed: [34].
- The evidence did not disclose a good reason to make an order for an itemised bill, and there was no evidence it was needed by the clients for the suggested purpose of settling or litigating their claims. Therefore, it was inappropriate to exercise the discretionary power to order CCL to deliver itemised bills of costs to the clients: [62]-[63].

International Decision of Interest

Discrimination: sex; sexual orientation

Bostock v. Clayton County **590 U.S. ___ (2020)**

Decision date: 15 June 2020

Roberts CJ, Thomas J, Ginsburg J, Breyer J, Alito J, Sotomayor J, Kagan J, Gorsuch J, Kavanaugh J

Three matters were heard together by the Supreme Court alleging sex discrimination against three employees on the basis of their being homosexual or transgender. Gerald Bostock was fired by Clayton County for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Donald Zarda was fired by Altitude Express days after he mentioned that he was gay. Aimee Stephens was fired by R. G. & G. R. Harris Funeral Homes after informing her employer that she planned to "live and work full-time as a woman", having obtained employment when she had presented as a male.

The matters were brought under Title VII of the *Civil Rights Act of 1964* which makes it unlawful for an employer to discriminate against an individual on the basis of their sex. The Court of Appeals for the Eleventh Circuit dismissed one appeal, holding that the law does not prohibit employers from firing employees for being homosexual. The Second and Sixth Circuits allowed their respective claims to proceed, finding that sexual orientation discrimination or transgender status discrimination does violate Title VII. The appellants brought an appeal to the US Supreme Court to resolve the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.

Held: by majority, affirming the decisions of the Second and Sixth Circuits; reversing the decision of the Eleventh Circuit and remanding the case for further proceedings consistent with the Opinion.

- The Court was required to interpret the Act in accordance with the ordinary public meaning of its terms at the time of its enactment: p. 4. An employer violates Title VII when it intentionally fires an individual employee based in part on sex: p. 9. Discrimination for being homosexual or transgender entails intentionally discriminating against individual men and women in part because of sex: p. 12. The statute's message was that an individual's homosexuality or transgender status is not relevant to employment decisions: p. 9.
- When determining whether sex discrimination has occurred, it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it: pp. 14-15.
- In dissent, Alito J stated that the Act did not include sexual orientation nor gender identity and therefore did not protect those attributes, and that the legislature had not passed legislation to include those attributes, making any attempt for the Court to do so equivalent to lawmaking: p. 1-2.