Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 March 2022 – 21 March 2022

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

Judicial Review: jurisdictional error; Motor Accidents Compensation

Insurance Australia Ltd v Marsh **[2022] NSWCA 31**

Decision date: 7 March 2022

Basten, Macfarlan and White JJA

In 2012 the respondent was injured in a "road rage" incident. Insurance Australia Ltd ('NRMA'), the insurer of the offending driver, admitted liability. A medical assessor issued a certificate stating that the respondent had suffered 5% whole person impairment that was causally related to the incident. The respondent provided particulars to NRMA outlining his claims for future treatment and domestic assistance, which NRMA disputed. That treatment dispute was referred to another medical assessor, Dr Truskett, who determined that the proposed treatments did not relate to the injuries caused by the incident and were not reasonable and necessary. The respondent applied to the proper officer of the State Insurance Regulatory Authority under s 63(1) of the *Motor Accidents Compensation Act 1999* (NSW) ('MACA') to have Dr Truskett's assessment referred to a review panel. The proper officer refused to refer the matter, not being satisfied that there was reasonable cause to suspect that Dr Truskett's assessment was "incorrect in a material respect" as required by s 63(3) (as it then provided). Upon judicial review of the proper officer's decision, the primary judge quashed the decision and ordered that the medical assessment be referred to a review panel. NRMA sought leave to appeal.

Held: allowing the appeal

- The primary judge's order that Dr Truskett's assessment be referred to a review panel was based on a finding that the "inevitable result" where a proper officer is confronted with conflicting opinions of medical practitioners is that there must be "reasonable cause to suspect that the medical assessment was incorrect in a material respect". That finding rested on a misconstruction of MACA, s 63: [7]-[8]. The proper officer's role under s 63 is as gatekeeper, not decision-maker; they may refer an assessment for review on being satisfied not of error, but of reasonable cause to suspect error: [9], [48]. Secondly, in circumstances where the subject matter of a medical assessment is a "medical dispute" which usually, if not invariably, entails a difference of medical opinions, the mere existence of differing opinions is not sufficient to ground a proper officer's satisfaction that there is reasonable cause to suspect error, lest the gateway function would be rendered nugatory: [10], [63]. That is apparent because the statutory function of a medical assessor is to form their own medical opinion, not to choose between or assess the correctness of competing opinions: [11]-[12], [64]–[65]. Further, the term "proper officer of the Authority" provides no basis for inferring that the officer will be medically trained; it would be wrong to construe the required state of satisfaction of the officer as requiring medical reasons to suspect that the assessment was incorrect in a material respect: [13].

- The primary judge ordered that the assessment be referred to a review panel on the basis that, as a matter of law, only one determination could have been made by the proper officer. That conclusion was wrong: [67]–[68].

Leave to Appeal; Practice and Procedure

Coffs Harbour City Council v Noubia Pty Limited **[2022] NSWCA 32**

Decision date: 21 March 2022

Leeming JA, Simpson AJA, Preston CJ of LEC

The underlying proceedings in the Land and Environment Court ('LEC') concerned the assessment of the compensation payable by the applicant, the Coffs Harbour City Council ('Council'), to the respondent for land transferred to the Council pursuant to a condition of development consent. That turned in part on expert evidence as to a proposed scheme for dealing with stormwater and floodwater on the land. The proceedings had been the subject of a successful appeal to the Court of Appeal, which remitted the matter. The parties had each led expert evidence before the original judge in the LEC. Once remitted, the parties' experts were cross-examined before a different judge ('the primary judge'), the original judge having since retired. The primary judge directed the experts to confer and prepare a further supplementary joint report; a report was prepared in which the experts agreed as to the appropriate modelling methodology. Following receipt of that report, the primary judge indicated that she would admit the report and gave reasons. The Council sought leave to appeal to the Court, seeking an order the effect of which would be the exclusion of parts of the report.

Held: refusing leave to appeal without calling upon the respondent

- Part of the Council's submission was that the experts had gone beyond the Court's directions. There was nothing in that complaint. The directions were to confer on specified topics and to prepare a further report. That is precisely what occurred: [9]. There was no injustice in there being a hearing conducted on a basis which reflects the actual opinions of both experts in 2022, after a series of conclaves in 2021, even if different from the opinions expressed earlier: [11]. The Council's real complaint was that until the most recent conclave of experts, the position it had advanced concerning the land necessary to be devoted to stormwater and floodwater would have been accepted: [12], [52]–[53].

- Contrary to the Council's submission, there are no universally applying "principles" that govern the exercise of discretion to allow further evidence on the hearing of a remitted matter: [70]–[71]. Once this Court set aside the decision of the court below, there were extant proceedings that were yet to be finally determined. On remitter, further steps, including further evidence and further submissions, may be required before the primary judge can again reserve judgment: [73]. This is especially true in circumstances where the remitted matter needs to be heard and determined by a different judge: [74]. It will be relevant if the further evidence relates to matters that the appellate court found had not been properly decided rather than findings that are unaffected by the appellate reversal: [76]. It will also be relevant that the circumstances of remittal may involve a degree of complexity not found in an application to reopen a trial: [77]. The trial judge is not obliged simply to accept the Council's evidence if the respondent's original evidence is discredited. Instead, the primary judge undertakes an evaluative task of determining the value of the transferred lands and hence the amount of compensation payable: [95].

Judicial Review: jurisdictional error; Criminal Offences

Petch v Director of Public Prosecutions (NSW) **[2022] NSWCA 33**

Decision date: 11 March 2022

Basten, Macfarlan and Payne JJA

The applicant, Mr Petch, was elected mayor of the City of Ryde Council in July 2012, around the same time that the Independent Commission against Corruption ('ICAC') commenced an investigation into certain councillors' conduct following a complaint by Mr Neish, the Council's general manager. In February 2013, Mr Petch and other councillors terminated the employment of Mr Neish on learning that adult pornography had been located on his Council-issued laptop. Telephone intercepts from early February 2013 showed that Mr Petch had disclosed information about the discovery of pornography on Mr Neish's laptop to other council officers. However, Mr Petch subsequently made statements before the ICAC to the effect that he wanted this information to remain confidential. Mr Petch was charged with offences of knowingly making false statements to the ICAC. Mr Petch argued that there was reasonable doubt as to his knowledge of the falsity of his answers, because the publication of the finding of pornography on Mr Neish's laptop was of no ongoing significance to him after he had secured Mr Neish's termination, and because of his poor recollection of the intercepted telephone conversations (said to be borne out by expert evidence showing that he was suffering from cognitive impairment and memory loss when he gave evidence before ICAC). A magistrate found him guilty of two offences and the District Court upheld those convictions. Mr Petch applied for judicial review, arguing that the District Court judge committed jurisdictional error by: (1) failing to address the significance to Mr Petch of the subject-matter of the false statements in determining whether he remembered the conversations; (2) failing to address the significance and reliability of the expert evidence; and (3) improperly applying the standard and burden of proof in a criminal prosecution.

Held: dismissing the application for judicial review

- A failure to address a substantial component of a party's case can amount to jurisdictional error. The absence of mention of a particular matter in the reasons has evidential significance in this respect. However, it is important to separate the contention from the evidence supporting the contention. The contention must be that the judge did not consider a substantial component of the applicant's case. It is not a complaint as to the inadequacy of reasons: [48]–[49]. The primary judge did not disregard any issue, let alone a substantial part of the applicant's case. The primary judge explicitly rejected any submission that a reasonable doubt attended Mr Petch's memory because the subject matter was of no importance to him: [59]–[60]. The primary judge also dealt in some detail with the expert evidence and found it did not demonstrate a basis for a reasonable doubt as to cognitive impairment or memory loss at the relevant time: [62]–[66].

- The factual finding made by the primary judge, namely, that the appellant did not suffer from a cognitive impairment which impacted upon his memory recall, did not amount to a legal burden on the defendant to disprove the prosecution case: [71]–[72]. The prosecution had to prove beyond reasonable doubt the applicant's knowledge of the falsity of his statement, for which the primary judge found 'overwhelming' evidence: [73].

Negligence: foreseeability; Workplace Injury

Cavanagh v Manning Valley Race Club Ltd **[2022] NSWCA 36**

Decision date: 15 March 2022

Leeming JA, Simpson AJA and N Adams J

The appellant, Mr Cavanagh, commenced proceedings against his former employer, the respondent, claiming that he had suffered serious injury to his cervical spine and right shoulder in the course of his work over 12 years as the Course Manager at the Bushland Drive Racecourse in Taree. One of his duties was to drive a tractor with a 'leveller' attached to its rear, which required the operator to constantly turn to the rear to check it was functioning correctly. It was agreed between the parties that Mr Cavanagh had suffered injury in the course of his employment and that his employment was a substantial contributing factor to the aggravation, acceleration, exacerbation and deterioration of his injuries. The parties disagreed as to whether the respondent breached its duty of care to the appellant. Much of Mr Cavanagh's pleaded case focused upon how frequently he was required to turn his head and upper body to look at the leveller. During his evidence in chief, he appeared to give a number of inconsistent accounts, ranging from his having turned to the rear 'once or twice a minute', to accounts suggesting he would spend only a few seconds each minute looking to the front and would otherwise direct his attention to the rear. The primary judge briefly referred to this evidence in his reasons before '[a]ccepting the outer limit of Mr Cavanagh's estimation' to find that he would only have turned to the rear once a minute for a duration of five or six seconds, and that this did not create a reasonably foreseeable risk of injury. Mr Cavanagh appealed against the decision.

Held: allowing the appeal

- Concision in judgments is desirable, but not if it comes at the expense of failing to give adequate reasons: [24]. There was real doubt as to how the reasons of the primary judge were to be understood on the issue of how often Mr Cavanagh was required to turn to the rear in the performance of his duties, which was treated by the primary judge as dispositive of the entirety of the claim: [26].

- Accepting that Mr Cavanagh did at one stage give evidence that he only turned his head "once or twice" a minute, notwithstanding his subsequent correction of that evidence, he also gave evidence that he turned his head more frequently. Yet the reasoning only addressed the possibility that Mr Cavanagh was turning his head once a minute: [30]. The trial judge stated that he was 'accepting the outer limit of' Mr Cavanagh's claim, but gave no explanation of why it was appropriate to proceed on the basis of the part of his testimony which was least favourable to him: [35].

- It is plainly foreseeable that a man who operates a machine in the course of his employment involving repetitive, sustained twisting of his neck may foreseeably aggravate, accelerate or exacerbate his cervical spine condition by doing so: [53]. That repetitive movements create a risk of injury is well known in industry, in the wider community, and to the judiciary. Judges who deal with cases of personal injury are to be credited with a modicum of understanding of the realities of the numerous ways in which injury may be caused: [63].

Australian Intermediate Appellate Decisions of Interest

Unlawful Discrimination on the Ground of Disability

Ryan v Commissioner of Police, NSW Police Force **[2022] FCAFC 36**

Decision date: 16 March 2022

Griffiths, Rangiah and Perry JJ

The appellant, Mr Ryan, was confirmed as a police officer in 1985 and appointed to the status of Leading Senior Constable ('LSC') in 2002. In 2009, he suffered physical and psychological injuries while on duty. Over the next five years, he remained on paid sick leave. On 15 January 2015, the Commissioner revoked the appellant's appointment as a LSC on the ground of inability to fulfil the inherent requirements of his role. The appellant alleged that by revoking his appointment, the respondent had engaged in unlawful discrimination against him on the ground of disability in breach of ss 15(2)(b) and (d) of the *Disability Discrimination Act 1992* (Cth) ('Act'). The primary judge dismissed that claim, finding that the decision to revoke the appellant's appointment was compelled by the existence of relevant preconditions, and that there was therefore no decision or positive action taken which was capable of constituting direct discrimination for the purposes of s 5(1) of the Act (which requires that the discriminator "treats" the aggrieved person less favourably). In view of this finding, the primary judge considered that the question whether there had been less favourable treatment "because of the disability" did not arise. Mr Ryan appealed from that decision. The respondent argued by Notice of Contention that the primary judge erred in finding that the appellant was an employee for the purposes of the Act, relying on the common law meanings of "employer" and "employee" as requiring a relationship under a contract of employment, which is absent in the case of police officers.

Held: dismissing the notice of contention and allowing the appeal

- Section 15(2) of the Act contained a more expansive meaning of "employer" and "employee" than at common law. First, the language of s 15(2) is consistent with a broader construction. The definition of "employment" in s 4 commences with the word "includes", a term which is generally intended to enlarge the ordinary meaning of the defined word: [95]–[104]. Second, a broader interpretation would best achieve the remedial purpose of the Act: [105]–[113]. Third, the relevant provisions are intended to give effect to Australia's obligations under the International Labor Organisation's *Discrimination (Employment and Occupation) Convention 1958*. It cannot be the case that "employment" was intended to have its common law meaning in the Convention, the overwhelming majority of signatories not being common law countries. Additionally, Australia's Convention obligations were in respect of equality of treatment in "occupation", not just "employment": [114]–[115]. The primary judge was correct in finding the appellant to be an employee: [117].

- The first sentence of clause 41.2 of the governing Award (see [138] for text) gives the Commissioner a broad discretionary power to revoke an appointment of an LSC: [148], [151], [200]. At the same time, the second sentence seems inconsistent with such a discretion: [149]. The clarity of the drafting of the first sentence makes it more likely that it "means what it says", namely that the Commissioner "may revoke the appointment of a Leading Senior Constable at any time": [152]. This discretion appears consistent with the industrial reality as well: [153]. The primary judge erred in concluding that the Commissioner was compelled to revoke the appellant's appointment and, as a result, could not have "treated" him less favourably than a person without a disability: [203].

Negligence: duty of care; Representative Proceedings

Minister for the Environment v Sharma **[2022] FCAFC 35**

Decision date: 15 March 2022

Allsop CJ, Beach and Wheelahan JJ

The appellant, the Minister for the Environment ('Minister'), is responsible for decision-making under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('Act'). The Minister was called on to exercise her powers under ss 130 and 133 of the Act to consider whether to approve an extension to a coal mine owned by Vickery Coal Pty Ltd. Representative proceedings were commenced by eight applicants on behalf of persons under 18 years of age who are ordinarily resident in Australia. At first instance, the applicants sought a declaration that the Minister owes a duty to take reasonable care in exercising her powers under ss 130 and 133 of the Act not to cause harm to them or the representative group; and an injunction restraining an apprehended breach of that duty by the Minister in exercising her power to approve the proposed extension to the mine. The primary judge found that the Minister did have a duty to take reasonable care "to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere", but did not grant an injunction. The Minister appealed from this decision.

Held: allowing the appeal

- The central error of the primary judge was to put aside questions about the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature, and to construct the duty by individual analysis of salient features commencing with the risk of harm, assuming in so doing that the matters thrown up by the duty were suitable for judicial determination as in any other tort case: [16]–[17], [238], [248]–[260].

- The Minister's responsibility at the time of making the approval decision under the Act was confined in scope. The Minister only assumed responsibility for approving the extension of the mine because of its likely significant impact on specified matters of national environmental significance under the Act, i.e. listed threatened species and communities and water resources. It was only to those matters, and not to climate change, the environment more generally, or the foreseeability of risk to the health and safety of people in the future, that the Minister's statutory task was directed: [88].

- The primary judge's reasoning relied on an inversion of the proper approach to statutory construction. Rather than starting with the express terms of ss 130, 133 and 136 of the Act read in context and with proper attention to statutory purpose, the primary judge made an *a priori* assumption about preservation of human safety being a relevant mandatory consideration and searched for a contrary intention to displace that assumption. That assumption could not be supported. Human safety is not identifiable as a mandatory consideration in the terms of s 136, which in turn conditions the exercise of the duties in ss 130 and 133: [216], [268], [589]–[592], [847].

- The relationship between the Minister and the representative group was not that of neighbours in the legal sense amenable to responsibility in the private law of tort. The relationship was one of government and governed in connection with the protection of species, communities and water resources in a limited decision under the Act: [346], [852].

Asia Pacific Decision of Interest

Judicial Misconduct

Abhay Jain v High Court of Judicature for Rajasthan, **Supreme Court of India, No. 6017/2020**

Decision date: 15 March 2022

Saran and Lalit JJ

Between 2013 and 2016, the appellant held various judicial positions in the area of Bharatpur, Rajasthan. In 2015, the appellant granted bail to an accused in circumstances where he, his predecessors and the Rajasthan High Court ('RHC') had earlier dismissed bail applications from the same accused. The RHC directed the appellant to submit comments regarding this decision. The appellant submitted that he was aware of the earlier dismissals but considered that there had been a change in circumstances given the period of custody was then approaching four months, there was no indication of when the prosecution would commence, and two other co-accused had since been granted bail by the RHC. The Chief Justice of the RHC, unsatisfied with the submissions, initiated an inquiry into the appellant in respect of misconduct and a violation of Rules 3 and 4 of the Rajasthan Civil Service (Conduct Rules) 1971. The Higher Judicial Committee recommended the appellant's discharge, which a Full Court subsequently ordered on the ground that the appellant's services were unsatisfactory during his probation period. The appellant sought to quash this order and be reinstated with consequential benefits. The appellant submitted that the order was made in response to the inquiry initiated against him, rather than as a result of unsatisfactory performance, and therefore the order was punitive in nature and violated Article 311(2) of the Constitution of India. The RHC dismissed the petition. The appellant filed a Special Leave petition in the Supreme Court.

Held: allowing the appeal

- The RHC erred in holding that the discharge order was a simpliciter order and not punitive in nature. The RHC failed to provide any reasoning as to how the allegation of misconduct pertaining to the bail order was not the foundation of the order of discharge, despite observing that the order had been passed on account of an inquiry initiated against the appellant: [41].
- Every judicial officer is likely to commit a mistake of some kind in passing orders during the initial stage of their service which a mature judicial officer would not do. However, if the orders are passed without any corrupt motive, proper guidance should be provided rather than disciplinary proceedings being initiated: [54], [66]. The charges filed against the appellant were vague in nature and absolutely no details were capable of supporting the allegation that he passed the bail order with extraneous considerations in mind or for an ulterior motive: [62].
- The appellant may have been guilty of negligence in the sense that he did not carefully go through the case file and did not take notice of a recent order of the RHC dismissing a bail application from the accused. That negligence cannot be treated as misconduct: [69].

International Decision of Interest

Civil Procedure: advance costs

Anderson v Alberta **2022 SCC 6**

Decision date: 18 March 2022

Wagner CJ, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ

Beaver Lake Cree Nation ('Beaver Lake') is a First Nation band whose members are beneficiaries of 'Treaty No 6'. In 2008, Beaver Lake sued the Crown for having improperly allowed its lands to be taken up for industrial and resource development. A four-month long trial is scheduled to begin in 2024. Beaver Lake submitted that the costs of litigation, estimated at $5 million, were beyond its reach. It sought an order for advance costs to fund its litigation. It contended that even though it had access to financial resources that could potentially fund the litigation, those resources had to be applied to address other priorities. The case management judge held that Beaver Lake was impecunious in the necessary sense and awarded it advance costs. The Court of Appeal set aside that decision, finding there was an error in principle to conclude that Beaver Lake was impecunious when it had financial resources which it chose to spend on other priorities. Beaver Lake appealed.

Held: allowing the appeal and remitting the matter for consideration in the Queen's Bench of Alberta:

- Three "absolute requirements" condition the award of advance costs: impecuniosity, a prima facie meritorious case, and issues of public importance: [24].
- A First Nation government that has access to financial resources may meet the impecuniosity requirement if it demonstrates that it requires such resources to meet its pressing needs. Pressing needs are not defined by the bare necessities of life. Rather, and in keeping with the imperative of reconciliation, they ought to be understood from the perspective of that First Nation government. A court may consider the broader context in which a First Nation government sets priorities and makes financial decisions, accounting for competing spending commitments, restrictions on the uses of its resources, and fiduciary and good governance obligations: [27], [32], [36]. Nevertheless, the threshold of impecuniosity remains high, is not easily met, and must be firmly grounded in the evidence. The court must be able to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's financial resources; and (4) identify the estimated costs of funding the litigation: [5], [41]–[52].
- Where litigation raises novel issues concerning the interpretation of Aboriginal and treaty rights and the infringement of those rights, this may have significant weight in a court's analysis of the public importance branch of the test: [26].
- The case management judge appropriately identified Beaver Lake's pressing needs, finding that the community lives in overall poverty: [55]–[56]. However, there was no evidence as to the financial resources required to meet its pressing needs: [57]–[61]. Additionally, further evidence regarding its assets and income could help the court to more accurately determine what resources it could access: [63], [67].