Decisions of interest

2 October 2017 – 13 October 2017

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

1. **Dust diseases: damages; apportionment between joint tortfeasors; double compensation**

   Northern Sydney Local Health District v Amaca Pty Ltd **[2017] NSWCA 251**

   Decision date: 10 October 2017

   McColl and Basten JJA, Sackville AJA

   Mr Dargan, a former employee of several hospitals, contracted mesothelioma through exposure to asbestos contracted by Amaca Pty Ltd (**Amaca**). Mr Dargan received $627,000 in workers' compensation payments under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (**WCR Act**). The WCR Act provided that WorkCover, Amaca's workers' compensation insurer, had a first charge on any damages (up to the compensation amount) which Mr Dargan may receive should he also sue Amaca.

   Mr Dargan commenced the proceedings against Amaca. WorkCover agreed that regardless of the WCR Act, WorkCover would permit Mr Dargan to retain 20% of the proceeds of the proceedings if that sum was equal to or less than the compensation payment.

   Following Mr Dargan's death, Amaca settled the proceedings for $410,000. Amaca sought contribution from Northern Sydney Local Health District (**Northern Health**) and the Hunter and New England Local Health District (**Hunter Health**). The primary judge found that both were liable to contribute.

   An issue on appeal was whether the agreement between Mr Dargan and the insurer meant Mr Dargan would be overcompensated by 20%.

   Held:

   - The primary judge did not err in finding that Northern Health and Hunter Health were liable to contribute.
   - The primary judge was correct to dismiss the "double recovery" defence. The purpose of the 20% payment was to incentivise Mr Dargan to litigate in circumstances where both parties recognised that he might not recover more than the compensation payments, but that any amount he did recover would provide a benefit to the insurer. Neither party viewed the payment as recovery for some particular loss or head of damage. Nor was there any intention to relieve the tortfeasor of part of its liability: [87].
   - Whether the insurer in fact exercises its charge over the damages is entirely irrelevant to the liability of the wrongdoer. It follows that it is irrelevant to the liability of all the wrongdoers, if there be more than one: [79].

2. **Voluntary associations: meaning of "unincorporated body"**

Qube Holdings Ltd v Residents Against Intermodal Development Moorebank Inc **[2017] NSWCA 250**

Decision date: 9 October 2017

Macfarlan, Meagher, Payne JJA

A development application lodged by Qube Holdings Ltd (**Qube**) in relation to the Moorebank Intermodal Facility was approved by the NSW Planning Assessment Commission. Residents Against Intermodal Development Inc (**RAIDM Inc**) appealed against the approval decision. Qube filed a notice of motion seeking summary dismissal of RAIDM Inc's appeal due to RAIDM Inc's lack of standing.

s 98 of the *Environmental Planning and Assessment Act 1979* (NSW) gives an "objector" standing to appeal against a determination of a consent authority. An "objector" is "a person who has made a submission … by way of objection". "Person" is defined to include "an unincorporated group of persons". RAIDM Inc did not object to Qube's application. However, RAIDM Inc submitted it inherited standing as an "objector" from its unincorporated predecessor, Residents Against Intermodal Development Moorebank (**RAID Moorebank**), which had objected.

The primary judge found that RAIDM Inc had standing. Qube appealed, arguing that RAIDM Inc did not inherit the standing from RAID Moorebank, or the latter was not an "unincorporated body" within the meaning of the AI Act. Specifically, it did not have a constitution making provision for membership and voting, or a list of members. Qube submitted these requirements arose from s 6(2) of the *Associations Incorporation Act 2009* (NSW) (**AI Act**), which requires an unincorporated body to have machinery to pass a "special resolution" by its "members"; and s 39, which specifies formal requirements of a special resolution.

Held:

- The Court granted leave but dismissed the appeal. Macfarlan JA found that s 39 applied only to the passage of special resolutions by an association, which is defined in s 4(1) to mean "an association registered under this Act": [33]. However, Meagher and Payne JJ observed that while s 39 does not apply to a resolution passed by an unincorporated body, the definition of "special resolution" in s 4(1) - "see section 39" - may still inform the meaning of those words as used in s 6(2): [64]-[65].

- There is no principle that an unincorporated body requires the characteristics that Qube identified. An unincorporated body consists of "some form of combination of persons (with a common interest or purpose) with a degree of organisation and continuity at least sufficient to distinguish the combination from an amorphous or fluctuating group of individuals and with some clear criteria or method for the identification of its members": *Kibby v Registrar of Titles* [1999] 1 VR 861. RAID Moorebank met this description, and its right of appeal passed to RAIDM Inc upon its incorporation: [39]-[43]; [64].

Other Australian intermediate appellate decisions of interest

3. **Defamation: publication on search engines**

***Google Inc v Duffy* [2017] SASFC 130**

Decision date: 4 October 2017

Kourakis CJ, Peek and Hinton JJ

Dr Duffy paid for and received psychic readings over the internet. The readings were false, and Dr Duffy engaged in an online conflict with the psychics. Articles about Dr Duffy were then published on a website calling her a "psychic stalker". When Google was used to search Dr Duffy's name it reproduced content from, and hyperlinked to, the underlying webpages. Google's autocomplete function also produced an alternate search term "Janice Duffy Psychic Stalker". These results were accessed by Ms Palumbo, Dr Duffy's hairdresser.

In September 2009, Dr Duffy requested that the appellant remove the paragraphs. Google did not take steps to remove the paragraphs until March 2011.

The primary judge found that Google was a secondary publisher of the defamatory material from the time that the respondent had notified it that the search engine was producing the material. His Honour awarded Dr Duffy $115,000 in general damages but did not make an award for loss of earning capacity.

Held:

- The Court unanimously dismissed the appeal.
- The primary Judge did not err in finding that Google was a secondary publisher. The search results amounted to a publication because it facilitated the reading of the defamatory material in a substantial and proximate way, which repeated and drew attention to the defamatory imputation and provided instantaneous access to it through a hyperlink: [187].
- The Court unanimously rejected the defence of justification. The appellant needed to prove that the respondent persistently did, or had a strong proclivity to, make unlawful or improper posts on the internet which were calculated to shame or denigrate psychics or cause them substantial distress. The respondent stalked only one psychic on a single occasion and so the truth of the imputation was not justified: [233]-[234].
- Peek J and Hinton JJ (Kourakis CJ dissenting) rejected the defence of statutory qualified privilege. For an individual to have an "interest in having information on some subject" sufficient to satisfy s 28(1)(a) of the *Defamation Act 2005* (SA), the interest must be more than a matter of curiosity. A user does not establish a sufficient interest by entering a term into a search engine: [398]-[407].

4. **Torts: whether medical test without consent amounts to battery; consent**

Pere v Central Queensland Hospital and Health Service **[2017] QCA 225**

Decision date: 6 October 2017

Gotterson and Morrison JJA and Applegarth J

Mr Pere was a security officer at Gladstone Hospital, Queensland. A co-worker observed him to be acting in an unusual manner and directed him to attend the Emergency Department. A doctor formed the opinion that blood and urine tests to screen for drugs and alcohol was required. The nurse's indicated that she took the blood sample "as per [medical officer] and [patient] consent", and that Mr Pere was "alert and oriented and cooperative". She gave evidence that she probably provided the applicant with a specimen jar for the urine test.

Mr Pere gave evidence that a nurse approached him from behind with a needle in her hand to take the blood sample. He also alleged that the nurse was present when he passed the urine sample. He submitted that this caused him depression, anxiety, adjustment disorder and had an adverse effect on his earning capacity.

The primary judge rejected Mr Pere's claim in battery, finding that he gave true consent to the provision of the samples. His Honour also rejected a claim in negligence as a reasonable person would not have foreseen that the requesting and taking of samples would cause the plaintiff psychiatric injury.

The issue on appeal was whether the trial judge erred in finding that Mr Perre provided true consent. Mr Pere submitted that cooperation did not suffice to establish consent, and that there was a "power imbalance" between him and his employer such that he did not have true freedom to consent.

Held:

- The Court dismissed the appeal. Whether a person consents to the taking of a blood or urine sample is a question of fact. However, it is not necessary that the words "I consent" be used. Real consent may be inferred from the patient's conduct: [26]; [31].
- The patient's conduct in presenting his arm and participating in the application of the tourniquet and cleaning solution overtly manifested his consent to the blood test. His passing of the urine into the jar also manifested consent: [31].
- In the context of employment, courts must be alive to the risk that what may appear, on the face of it, to be real consent is not in fact so. However, the doctor gave evidence that Mr Perre was treated as a patient. He was not ordered to undergo the tests as if he was an employee who worked at the doctor's direction: [27]; [34].

High Court Cases considered:

Rogers v Whitaker (1992) 175 CLR 479

Asia Pacific decisions of interest

5. **Banking and finance: instruments; loan facilities; force majeure**

Solomon Islands Court of Appeal

Development Bank of Solomon Islands v Zalao **[2017] SBCA 10**

Decision date: 13 October 2017

Goldsbrough P, Ward JA, Hansen JA

Mr Zalao obtained a business loan from the Development Bank of Solomon Islands (**DBSI**) to purchase a three ton truck. Mr Zalao paid off the loan satisfactorily until ethnic violence heavily impacted the Solomon Islands. Mr Zalao reported that the truck was stolen at gunpoint by Malaita militants. As violence increasingly interfered with normal life, DBSI agreed to "freeze" Mr Zalao's interest payments.

At this time, the High Court appointed the Central Bank of Solomon Islands (**CBSI**) as liquidator of DBSI. The Court ordered that CBSI take all reasonable legal and prudent action to collect all non-performing loans and advances. CBSI made a unilateral decision to resume interest payments with respect to Mr Zalao's loan, and debited Mr Zalao's account with the interest the bank calculated had been frozen. No notice was given to Mr Zalao that this would happen.

DBSI commenced a claim to recover the interest. The primary judge found that DBSI did not have the right to and was not justified in law to reverse the frozen interest. On appeal, DBSI argued that the frozen interest could not be claimed on the grounds of force majeure, hardship or waiver.

Held:

- The Court dismissed the appeal. The term "freeze" is not a term of art, and so it is necessary to look at the evidence to ascertain what was intended by the bank: [12].
- There was clear evidence that, when the DBSI imposed the freeze, interest payments would not be payable or accumulate during the period of the freeze. However, there was no further evidence of what would occur when the freeze was called off: [12].
- The circumstances at the time of the troubles fall within the definition of force majeure. There is no such term included in the loan agreement. However, evidence demonstrates that the DBSI imposed the freeze because it accepted the adverse effect of the troubles on businesses and was willing to suspend interest to alleviate the hardship: [13].
- Accordingly, the interest is money foregone by the bank by its acceptance of the freeze until further notice: [14].

6. **Civil procedure: disclosure of documents**

Court of Appeal of Singapore

Goh Seng Heng v Liberty Sky Investments Ltd **[2017] SGCA 59**

Decision date: 5 October 2017

Andrew Phang Boon Leong JA, Prakash JA and Tay Yong Kwang JA

Liberty Sky Investments Limited (**LSI**) purchased shares in Anaesthetic Medial Partners from Dr Goh Seng Heng (**Dr Goh**). LSI alleged that Dr Goh made fraudulent representations which induced LSI to enter into a share sale and purchase agreement.

The primary judge granted two orders:

- A Mareva injunction against Dr Goh, granted on the basis that three of Mr Goh's representations were prima facie cases of fraud. On appeal, the issue was whether LSI needed to show a reasonable prima facie case of fraud, or needed to demonstrate compelling evidence of fraud.
- An order that Oversea-Chinese Banking Corporation (**OCBC**) disclose documents relating to Dr Goh's account. LSI did not inform Dr Goh of this claim, but later found out and applied to be added as a defendant.

Held:

- The Court allowed the appeal against both orders.
- In relation to the first claim, the Court indicated that it did not need to decide which standard was applicable. LSI had not even demonstrated a prima facie case of fraud: [25].
- In relation to the second claim, LSI did not come to the court with clean hands and so the order could not stand on appeal. Dr Goh found out about the second claim and was able to appear in court to oppose it. However, LSI commenced the claim in a manner that plainly went against the spirit of the law: [60].
- The Court concluded with a comment that: "*we wish to remind all advocates of the importance of adhering to the spirit of the law, and not just the letter of the law. While advocates within an adversarial system are constrained to engage in legal combat, they are not entitled to pursue victory at all costs, regardless of the means*": [62].

Other international decisions of interest

7. **Civil procedure: limitation periods; meaning of "bodily injury"**

Supreme Court of Canada

***Montreal (City) v Dorval*, 2017 SCC 48**

Decision date: 13 October 2017

McLachlin CJ and Abella, Moldaver, Wagner, Gascon, Côté and Brown JJ

In October 2010, D was murdered by her former spouse. In October 2013, members of D's immediate family sued the City of Montreal as principal of the police officers whose negligence allegedly contributed to D's death. The family members sought damages for emotional harm, funeral expenses and loss of emotional support.

The City of Montreal filed a motion to dismiss the claim on the basis that s 586 of the *Cities and Towns Act* prescribes a six month limitation period for causes of action brought against a municipality. The family members submitted that their action fell within the three-year limitation period of the *Civil Code of Quebec,* which applies to actions "based on the obligation to make reparation for bodily injury caused to another".

The trial judge found that art 2930 of the Civil Code did not apply because the family members had not themselves suffered any bodily injury. The Court of Appeal allowed the appeal. The City of Montreal then appealed to the Supreme Court.

Held:

- The majority dismissed the appeal. The three year limitation period in art 2930 was applicable to the claim. The term "bodily injury" refers to interference with a person's physical integrity. For the purposes of art 2930, it is the nature of the initial interference, rather than the head of damages being claimed, that results in the injury being characterised as "bodily injury": [26]-[27].

- This interpretation is consistent with the legislature's intention. Article 2930 was enacted to better protect the integrity of the person and to ensure full compensation for those whose personal integrity has been interfered with. A large and liberal interpretation of art 2930 facilitates access to justice for victims: [32]-[35].

- The minority (Côté and Brown JJ) found that the limitation period had expired. Members of D's family may not avail themselves of the three-year limitation period under art 2930, given that they have not themselves suffered bodily injury as a result of D's death.

8. **Aboriginals: settlement of class action; destruction of records**

Supreme Court of Canada

***Canada (Attorney General) v Fontaine,* 2017 SCC 47**

Decision date: 6 October 2017

McLachlin CJ and Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

From 1860 to the 1990s, more than 150,000 First Nations, Inuit and Métis children were required to attend Indian Residential Schools. It is accepted that thousands of the children were physically, emotionally and sexually abused. The survivors brought a number of individual and class actions.

In 2006, the actions were consolidated and settled by the Indian Residential Schools Settlement Agreement (**IRSSA**). The IRSSA allowed survivors to commence claims under the Independent Assessment Process (**IAP**), which required them to disclose acutely sensitive personal information.

The Chief Adjudicator sought advice from the Ontario Superior Court on whether to dispose of documents containing this sensitive information. The supervising judge found that the records must be destroyed following a 15-year retention period, during which individual claimants could elect to preserve their records. The issue on appeal was whether the documents were "under the control of a government institution", so as to bring them within the freedom of information schemes in the *Access to Information Act*, *Privacy Act* and *Library and Archives of Canada Act*.

Held:

- The Court dismissed the appeal. The supervising judge did not err in finding that the IRSSA allowed for the destruction of the IAP documents. The IRSSA's negotiators intended the IAP to be a confidential and private process, and the claimants and perpetrators relied on confidentiality assurances: [42].
- The text and structure of the IRSSA support this interpretation:
    - The "Guide to the Independent Assessment Process Application" refers to federal access, privacy, and archiving legislation. However, the Guide does not form part of the IRSSA, and the official document should prevail where there are any differences: [48]-[49].
    - Schedule D of the IRSSA does not state whether federal legislation will apply to documents created or uncovered by the IAP: [51]; [53].
    - Schedule N of the IRSSA provides that the process is committed to the principle of voluntariness with respect to individuals' participation: [57].
- The order crafted by the supervising judge was an appropriate exercise of his discretionary power, and struck a balance between preserving confidentiality and the need to memorialise and commemorate: [62].