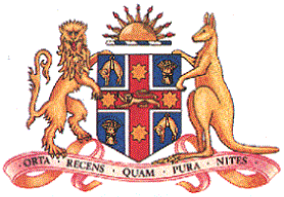

Court of Appeal
Supreme Court
Sydney

Decisions of Interest

28 March 2020 – 10 April 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.

Contents

New South Wales Court of Appeal decisions of interest

Defamation: procedural fairness, defences

Feldman v Polaris Media Pty Ltd as Trustee of the Polaris Media Trust t/as The Australian Jewish News **[2020] NSWCA 56**

Decision date: 1 April 2020

White JA, Emmett AJA, Simpson AJA

Rabbi Yosef Feldman brought proceedings against Polaris Media and Joshua Levi for defamation in publishing three articles and an editorial in the Australian Jewish News in 2015. The articles related to evidence provided by Rabbi Feldman to the Royal Commission into Institutional Responses to Child Sexual Abuse relating to his knowledge of alleged child sexual abuse committed by a rabbinical student of the Yeshiva Gedola in Bondi, where Rabbi Feldman was the Rabbinical administrator.

Rabbi Feldman pleaded that the articles conveyed various imputations that he displayed reprehensible ignorance of crimes relating to child sexual abuse; that he failed to notify the Department of Corrective Services that a sex offender was about to leave the jurisdiction in circumstances where he was obliged to do so; and that he attempted to assist a child sex offender from evading justice. The respondents raised a variety of defences, including the defence of honest opinion, which was upheld. The primary judge gave judgment for the respondents. Rabbi Feldman sought leave to appeal.

Held:

- By majority leave to appeal was granted, appeal dismissed: [127], [166] (Simpson AJA refusing leave: [261]).
- The judges analysed each of the defences raised in relation to each publication and held that some defences should not have been upheld by the primary judge, while others were correctly upheld.
- To succeed in establishing the defence of fair comment, the published matter must be comment and not a statement of fact, and the defence of fair comment must be responsive to the defamatory meaning contained in the matter published. The matter published must be comment rather than fact, but if the matter published is comment, then the comment will have the meaning found and its fairness must be assessed having regard to that meaning: [63].
- The first question in considering whether the defence of honest opinion has been established is whether the defamatory matter, not the imputation, was a statement of opinion rather than fact: [66]. The proper material upon which an opinion can be expressed need not be such that would prove that the underlying facts upon which the opinion was expressed were substantially true: [123].

Workers Compensation

***Workers Compensation Nominal Insurer v Hill* [2020] NSWCA 54**

Decision date: 31 March 2020

Basten JA, Payne JA, Simpson AJA

In 2010 Michel Carroll was killed by her de facto partner Steven Hill. Both were employed by a family company, S L Hill & Associates, which operated from the family home. The attack by Hill was inspired by paranoid delusions and, having been charged with murder, he was found not guilty on the ground of mental illness. At the time of her death, Ms Carroll had two dependent children. The children made claims for workers compensation. S L & Hill Associates has been deregistered and the claims were resisted by the Workers Compensation Nominal Insurer.

In 2018 an Arbitrator at the Workers Compensation Commission determined that Ms Carroll had died as a result of injury arising out of and in the course of her employment and ordered payments in favour of the two children. In 2019 the Insurer lodged an appeal. The appeal was dealt with without an oral hearing and was dismissed by the Deputy President of the Commission. The Insurer brought an appeal challenging this decision, challenging certain findings of fact relating to whether Ms Carroll's injury arose in the course of her employment, and whether her employment was a substantial contributing factor to her injury.

Held:

- Appeal dismissed: [59]. There was no legal error by the Deputy President in rejecting the appeal: [58].
- The line between preferring a different result and identifying error is not easy to draw. If, on an appeal by way of rehearing, the court asked whether the findings of fact were "open" to the trial judge, that might demonstrate an unduly limited understanding of the court's function; however, that language is not out of place in determining an appeal against a decision of the Commission constituted by an Arbitrator: [20].
- It could not be said that there was no evidence capable of supporting the findings that Ms Carroll was "actually performing employment–related duties" and was "on call" at the time of her death: [43]-[44]; nor that there was no evidence to support the finding that there was a causal connection between the attack upon Ms Carroll and her employment: [49].
- The Deputy President was satisfied that Ms Carroll's employment was a substantial contributing factor to her injury within the meaning of the *Workers Compensation Act 1987* (NSW): [55]. The matters she identified in determining this were appropriate: [51].

Statutory Interpretation; Workers Compensation

***Australian Rail Track Corporation Limited v Dollisson* [2020] NSWCA 58**

Decision date: 31 March 2020

Bell ACJ, Macfarlan JA, Emmett AJA

Ryan Dollisson, a NSW resident and employee of a company incorporated and carrying on business in NSW, was injured in Victoria whilst working on a rail line owned by Australian Rail Track Corporation (ARTC). Mr Dollisson received compensation under NSW Workers Compensation legislation, as his employment was connected with NSW within the meaning of the *Workers Compensation Act 1987* (NSW). Mr Dollisson sought damages for his personal injury in the Supreme Court of NSW from ARTC for its alleged negligence in failing to provide, install and maintain a safe operating system to ensure the safety of workers.

Because Mr Dollisson was injured in Victoria, his claim fell to be determined by reference to the law of Victoria. Mr Dollisson required an extension of time under the *Limitation of Actions Act 1958* (Vic) within which to bring his claim which was granted by the primary judge. ARTC brought an application for leave to appeal this grant of an extension, arguing that the extension was futile as Mr Dollisson had not satisfied the steps required by the *Accident Compensation Act 1985* (Vic) (ACA) when a worker who suffers injury arising out of or in the course of employment wishes to pursue a claim for damages against a non-employer defendant.

The issue on appeal was whether the limitations or prerequisites for the recovery of damages imposed by the ACA apply to a worker who has received or is entitled to compensation under **any** statutory regime in respect of an employment related injury, or only to a worker who receives compensation under the ACA.

Held:

- Granting leave to appeal, but dismissing the appeal (Emmett AJA dissenting): [61]-[62], the omission of the words “under the Act” to qualify the reference to compensation in s 134AB(1) of the ACA was not designed to preclude, limit or condition the recovery of third party damages by a worker who was not entitled to compensation under it: [13]. The reference to compensation in s 134AB(1) of the ACA is to compensation under or in accordance with the ACA: [16]. *Expressio unius* reasoning rejected.

- Mr Dollisson’s failure to pass through the statutory gateways erected by the ACA did not stand in the way of his claim for damages and the grant of an extension of time was not futile: [15].

- In dissent, Emmett AJA held that the gateway provisions of s 134AA or s 134AB of the ACA were applicable to Mr Dollisson’s claims against ARTC. Therefore, Mr Dollisson would not be entitled to recover damages from ARTC and there was no utility in the grant of an extension of time: [134]-[136].

Workers Compensation: evidence, statutory construction

***Booth v Fourmeninapub Pty Ltd* [2020] NSWCA 57**

Decision date: 2 April 2020

Bell P, Leeming JA, White JA

In 2002 Ms Booth witnessed a traumatic incident while employed in a hotel by Fourmeninapub Pty Ltd as a bar attendant. Ms Booth suffered a primary psychological injury, manifesting itself as Post Traumatic Stress Disorder, as a result of the incident, and ceased working at the hotel. Ms Booth had a predisposition to bipolar disorder, which first manifested itself some two years after the incident. In 2018 Ms Booth claimed lump sum compensation in relation to her Bipolar Disorder. The insurer disputed liability for the claim, contending that Ms Booth did not have Bipolar Disorder until after she had ceased employment. Proceedings were commenced in the Workers Compensation Commission and an arbitrator determined the application, finding that Ms Booth's employment was the substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration of her Bipolar Disorder.

Fourmeninapub brought an appeal to the Commission constituted by the President, contending that Ms Booth was not suffering from a "disease" when the aggravation was said to have occurred. The President determined that Ms Booth did not demonstrate that there was an underlying disease condition of Bipolar Disorder. Ms Booth brought an appeal as of right, confined to "points of law". The issue on appeal was whether aggravation of a genetic predisposition is a compensable injury.

Held:

- Appeal dismissed: [61].
- The meaning of the expert evidence was a matter in relation to which the Court was as well placed as the arbitrator and the President to determine. No error in the President's reasons was made out: [48].
- Having a predisposition to a disease is used in contradistinction to having the disease: [54]. A genetic predisposition is the absence of a physical or mental condition, albeit there is an elevated susceptibility to developing in the future a physical or mental condition: [57].
- The *Workers Compensation Act 1987* (NSW) distinguishes between cases of a disease being "contracted" by a worker, and cases of the "aggravation, acceleration, exacerbation or deterioration" of a disease. In order for the disease to satisfy the latter limb, it must have existed prior to the event in the workplace of which complaint is made. A genetic predisposition is not a disease in that sense because there was nothing manifested which could be aggravated, accelerated, exacerbated or the subject of deterioration: [58]

Australian intermediate appellate decisions of interest

Constitutional Law: judicial power; Superannuation

***QSuper Board v Australian Financial Complaints Authority Limited* [2020] FCAFC 55**

Decision date: 9 April 2020

Moshinsky J, Bromwich J and Derrington J

In 2019 Dr Lam complained to the Australian Financial Complaints Authority (AFCA), alleging that he was entitled to a refund from QSuper because, from 2016 to 2018, he had overpaid premiums for death and total and permanent impairment cover which he had acquired through his superannuation fund. He was eligible to pay a lower premium during that period, on the basis that he fell within the new "professional" occupational rating introduced in 2016. Dr Lam had received a letter in 2016 from QSuper sent to all members which outlined changes to insurance premiums, including the introduction of occupational ratings. QSuper argued that Dr Lam was given sufficient information to allow him to apply for changes to his insurance cover and qualify for a reduced premium.

In 2019 AFCA decided the complaint in favour of Dr Lam and that he should be refunded the difference between the amount of the premiums which he had paid and the amount he would have paid had he been classified as a professional. QSuper brought an appeal.

A significant issue on appeal was whether AFCA's decision was invalid because the powers purportedly exercised by it under the *Corporations Act 2001* (Cth) contravened Ch III of the Constitution by conferring the judicial power of the Commonwealth on a non-judicial body.

Held:

- Leave to appeal granted, appeal dismissed: [207].
- AFCA was not exercising judicial power, as its determination relating to Dr Lam's complaint exhibited none of the indicia of judicial power. The legally relevant circumstances were indistinguishable from *Breckler*,[1] where it was held that the exercise of the determination-making power by the Superannuation Complaints Tribunal did not involve an exercise of judicial power: [186].
- None of the provisions of the *Corporations Act* which established the AFCA scheme and granted AFCA power to make determinations offended Ch III of the Constitution: [187].

[1] *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83.

Torts: motor vehicle accidents

***Joyce v Anderson* [2020] WASCA 48**

Decision date: 8 April 2020

Mitchell JA, Beech JA, Vaughan JA

In 2013 Roger Hill died from injuries he sustained when a bicycle he was riding collided with a car being driven by Clara Joyce. The collision occurred at an intersection controlled by a roundabout. Ms Joyce almost came to a stop at the intersection before entering, without seeing Mr Hill. Ms Joyce entered the intersection and blocked Mr Hill's path, who rode into Ms Joyce's car. Mr Hill suffered a chest injury and penetration wound to his heart which resulted in his death.

Gillian Anderson, Mr Hill's wife, brought proceedings for the benefit of herself and her children. Ms Joyce admitted that her negligent driving was a cause of Mr Hill's death, but contended that the damages should have been reduced on account of Mr Hill's contributory negligence. The essence of this argument was that Mr Hill was travelling at excessive speed in the circumstances and failed to keep a proper lookout.

The trial judge found that Mr Hill was not contributorily negligent and ordered that Ms Joyce pay Ms Anderson 100% of the damages to be assessed. Ms Joyce brought an appeal, arguing that, inter alia, the trial judge provided inadequate reasons and made wrong findings.

Held:

- Appeal dismissed: [195], [272].
- The fundamental elements of a statement of reasons are: a reference to the relevant evidence; a statement of material findings of fact and any ultimate conclusions; a statement of the reasons for making those findings and conclusions; and an explanation of how the law was applied to the facts as found: [80].
- The judge's reasons satisfied these fundamental elements. Ms Joyce's complaints were either a disagreement with the reasoning process, or a complaint that error was revealed by that process, rather than a complaint that the reasoning process was unascertainable: [81].
- The principles of appellate restraint adverted to by Ms Joyce do not only apply to credibility based findings. Appellate restraint with respect to interference with factual findings applies when a finding was likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing the witnesses give their evidence: [205].

Asia Pacific decision of interest

Competition: price fixing

***Lodge Real Estate Limited v Commerce Commission* [2020] NZSC 25**

Decision date: 2 April 2020

Winkelmann CJ, Glazebrook J, O'Regan J, Ellen France J and Williams J

In 2013 Trade Me Ltd, which provided a property listing service through a website called Trade Me, proposed to change its policies for charging for standard residential listings on its site, by charging a fee for each individual standard residential listing. This would substantially increase the overall costs of listings for real estate agencies. Representatives of a number of real estate agencies met on multiple occasions to discuss this proposal. The alleged agreement was to remove Trade Me from the agencies' standard listings of residential property for sale. The Commerce Commission alleged that as a result of these meetings, the agencies entered into a price fixing agreement in breach of the *Commerce Act 1986*.

The Commission commenced proceedings against the agencies and their principals, seeking pecuniary penalties. Lodge and Monarch Real Estates and their principals denied liability. The claim failed in the High Court, where it was held that the parties had entered into an arrangement but it did not have the purpose of price fixing. The Commission appealed to the Court of Appeal. The Court of Appeal held that the arrangement did have the purpose of price fixing. The agencies brought an application for leave to appeal, which the Supreme Court allowed to determine whether the agencies entered an arrangement and gave effect to that arrangement, and whether it had the purpose of price fixing.

Held:

- Appeal dismissed: [179].
- The task of the Court in determining whether an arrangement was created was to conduct an objective assessment of the parties' words and conduct: [50]. Mere conscious parallelism does not amount to an arrangement: [51].
- The agencies reached a consensus which involved a commitment from each of them to adopt a vendor funded model for Trade Me Listings and to remove existing listings. This created an expectation as to the common course of conduct: [109]. The agencies gave effect to this arrangement by removing the standard listings and moving to vendor funding: [110].
- The Trade Me listing fee was a sufficiently significant component of the overall price to bring the arrangement within the ambit of the Act: [161]. The arrangement did interfere with the competitive price setting for the services offered by the agencies and effectively prevented potential competition from developing: [170]-[171]. A substantial purpose of the arrangement was to restrict the field of competition between the agencies on that element of the price: [178].

International decisions of interest

Electoral Voting

***Republican National Committee v. Democratic National Committee* 589 US __ (2020)**

Decision date: 6 April 2020

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

Wisconsin voters, community organisations, and the committee of the Democratic Party filed lawsuits against members of the Wisconsin Elections Commission. They sought several forms of relief, all aimed at easing the effects of the COVID–19 pandemic on the election in Wisconsin. The District Court issued a preliminary injunction, concluding that the existing deadlines for absentee voting would unconstitutionally burden Wisconsin citizens' right to vote.

The District Court extended the deadline for voters to request absentee ballots from 2 April to 3 April, and extended the deadline for election officials to receive absentee ballots from 7 April to 13 April, regardless of the postmark date, affording Wisconsin voters additional time in which to mail their absentee ballots after election day. The District Court had to issue a subsequent order enjoining the public release of any election results for six days after election day. An application for a stay of these orders was brought by the Committee of the Republican Party.

The question before the Supreme Court was whether absentee ballots were required to be mailed and postmarked before the election date of 7 April 2020, as state law required, or whether they could be mailed and postmarked after election day, so long as they were received by 13 April 2020.

Held:

- Stay granted: p. 4 (Ginsburg J, Breyer J, Sotomayor J and Kagan J dissenting).
- In order for a vote to be counted, an absentee ballot must have been postmarked by election day, 7 April 2020, and received by 13 April 2020, or hand-delivered by 7 April 2020: p. 4.
- Extending the date by which ballots may be cast by voters for an additional six days after the scheduled election day fundamentally alters the nature of the election. By changing the election rules so close to the election date, the District Court contravened the Supreme Court's precedents and erred by ordering such relief: p.2.
- In dissent, Ginsburg J raised concerns regarding disenfranchisement of those who would not receive their absentee ballot before election day, estimating it to be thousands of voters: p. 4.

Torts: damages

***Whittington Hospital NHS Trust v XX* [2020] UKSC 14**

Decision date: 1 April 2020

Lady Hale, Lord Reed, Lord Kerr, Lord Wilson, Lord Carnwath

Due to the admitted negligence of Whittington Hospital in 2008 and 2012, XX had a delayed diagnosis of cervical cancer. By the time of diagnosis in 2013, her condition was too advanced for her to have the surgery which would have preserved her ability to bear a child, and she underwent chemo-radiotherapy which resulted in her being unable to bear a child. Had appropriate action been taken in 2008, there was a 95% chance of a complete cure, and she would not have developed cancer at all.

Proceedings were brought by XX seeking damages, including for the loss of the ability to bear her own child. XX and her partner wanted to have four children, through the use of non-commercial surrogacy in the UK and commercial surrogacy arrangements in California. The primary judge held that he was bound by *Briody*[2] in rejecting a claim for commercial surrogacy in California as contrary to public policy, and in holding that surrogacy using donor eggs was not restorative of XX's fertility. He held that non-commercial surrogacy using XX's own eggs was restorative, and XX was awarded £74,000 in damages. XX brought an appeal challenging the denial of her claim for commercial surrogacy, which was allowed.

The Hospital brought an appeal. The issues on appeal were whether damages were recoverable to fund non-commercial surrogacy arrangements, surrogacy arrangements using donor eggs, and commercial surrogacy arrangements abroad.

Held:

- Appeal dismissed: [54] (Lord Carnwath and Lord Reed dissenting).
- The Court was not bound by *Briody*: [28]. XX's proposed course did not involve a criminal offence in the UK or abroad. Commercial surrogacy is lawful in California and UK law does not prohibit XX from taking part in it: [40].
- The pleasure of bringing up children as one's own is the most important benefit of having children for many women, and as this was the best that could be achieved to make good what XX had lost, XX should not be denied this: [47].
- It is no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy. Damages would only be awarded if the proposed programme of treatments was reasonable; it was reasonable for the claimant to seek foreign rather than domestic arrangements; and the costs were reasonable: [53].

[2] *Briody v St Helen's and Knowsley Area Health Authority* [2001] EWCA Civ 1010; [2002] QB 856.