
Court of Appeal
Supreme Court
Sydney

# Decisions of Interest

20 June 2020 – 3 July 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

## Tort: misfeasance in public office

***Ea v Diaconu* [2020] NSWCA 127**

**Decision date**: 30 June 2020

Payne JA, White JA, Simpson AJA

Between 2012-15 Mr Song Ea was prosecuted for offences against the *Criminal Code Act 1995* (Cth) and the *Migration Act 1958* (Cth). At Mr Ea's first trial, the jury was unable to agree upon any verdicts and was discharged. In a second trial in 2014 a jury returned verdicts of guilty for certain migration offences.

In 2018 Mr Ea commenced proceedings alleging the torts of misfeasance in public office and malicious prosecution against Ms Dana Diaconu, an officer of the Australian Federal Police, and the Commonwealth of Australia as vicariously liable for her actions. The statement of claim alleged that Ms Diaconu committed the former by reason of her conduct in the court public gallery during Mr Ea's first trial, including laughing, gesturing, rolling her eyes and grinning. In 2019 the primary judge summarily dismissed Mr Ea's statement of claim.

**Held:** granting leave, allowing the appeal against two respondents: [63].

- Mr Ea's argument was not hopeless, and summarily dismissing the claim was inconsistent with the possible development of the law: [57]. Further, it is usually better to assess the viability of a cause of action when the facts have been adduced and the action can be judged with a full understanding of all relevant evidence which gives colour and content to the development of legal principle: [129].
- There is a distinction between a de facto power incident to a public office and a power conferred on the holder of the public office. The conferral of public powers on a person is the hallmark of that person holding public office. It is arguable that the abuse of de facto powers derived from the conferral of powers that make the office a public office are within the scope of the tort: [74], [127]. Ms Diaconu's alleged misbehaviour in court was not done in the exercise of any authority conferred on her, but was arguably the exercise of a de facto power, that is, a capacity she had, by virtue of her office, to influence the jury by her reactions to submissions and evidence: [76].
- The fourth element of the tort of misfeasance in public office as identified by Deane J in *Mengel*[1] is "being in purported discharge of his/her public duty", which requires the public officer to have exercised a power conferred or discharged a duty: [137]. However, the terminology used in other cases is capable of indicating a broader approach including "authority", "abuse of office" and "functions": [140]-[141]. There was sufficient doubt as to this element to warrant Mr Ea's claim going to a hearing: [147].

[1] *Northern Territory v Mengel* (1995) 185 CLR 307; [1995] HCA 65

## Evidence: previous sexual activity

***Jackmain (a pseudonym) v R* [2020] NSWCCA 150**

**Decision date:** 3 July 2020

Bathurst CJ, Leeming JA, Johnson J, Button J, Wilson J

In 2017 Mr Jackmain (a pseudonym) was charged with assault occasioning actual bodily harm and three counts of sexual intercourse without consent against his former partner, the complainant. Mr Jackmain sought to adduce evidence that the complainant had made false allegations of sexual assault on 12 prior occasions, most of which were made when the complainant was a teenager, more than a decade before the events giving rise to Mr Jackmain's prosecution.

The District Court held that evidence sought to be adduced by Mr Jackmain was inadmissible pursuant to s 293(3) of the *Criminal Procedure Act 1986* (NSW), which renders evidence of a complainant's sexual experience or activity inadmissible in proceedings for certain sexual offences. Mr Jackmain argued that s 293(3) did not render the evidence inadmissible; that the s 293(4)(a) exception applied; that s 293 was invalid; or that the proceeding should be permanently stayed.

**Held:** granting leave and dismissing the appeal: [229].

- The context of s 293 demonstrates that its purpose is to protect complainants in sexual assault cases by preventing embarrassing and humiliating cross-examination about past sexual activities. The wide interpretation propounded in *M v R*[2] is consistent with that approach and is not plainly wrong: [23]-[24].
- A literal interpretation of s 293(3) may capture evidence which has nothing to do with sexual activity, if it discloses or implies that a complainant has not or may not have taken part in any sexual activity: [150]. However, overturning the *M v R* interpretation is a course to be taken by the Legislature and not the courts, especially when the criticisms of the section must be taken to have been known by the Legislature when amending the Act: [165]-[166].
- Statutory restrictions on appellate review prevented the Court from reviewing the primary judge's rulings on evidence: [74]-[75], [80], [86]-[87].
- In order to demonstrate the invalidity of a legislative provision for infringing the *Kable* principle, it is necessary to identify a substantial impairment of a State court's institutional integrity, which is incompatible with that court's role as a repository of federal jurisdiction: [198]. There can be no such impairment if the court reserves power to stay the proceedings: [204].
- The power to stay proceedings permanently is an exceptional remedy and will only be granted in extreme or exceptional cases, reflecting the public interest in serious allegations being disposed of on the merits: [213]. The primary judge was correct to refuse the application, although for different reasons: [228].

[2] (1993) 67 A Crim R 549

## Administrative Law: health profession regulation

***Ghosh v Medical Council of New South Wales* [2020] NSWCA 122**

**Decision date:** 26 June 2020

Brereton JA, Emmett AJA, Simpson AJA

Dr Ratna Ghosh was a registered medical practitioner. Between 2005-16 Dr Ghosh was the subject of nine complaints, three of which resulted in performance interviews. A medical practitioner in whose practice Dr Ghosh had been employed made a notification that he believed Dr Ghosh was suffering from a mental impairment that may place the public at risk of harm and had terminated her employment in 2017.

In 2017 delegates of the Medical Council of NSW convened a hearing pursuant to s 150(1)(a) of the National Law. The Council found that there were no conditions that would minimise the risk Dr Ghosh posed to her patients and suspended her registration until her mental health was assessed. Dr Ghosh applied for a review of that decision under s 150A, following multiple psychiatric reviews. While the Council did not find that there had been a relevant change in circumstances, the suspension was substituted for a condition that she not practise medicine. Dr Ghosh brought an appeal challenging both Council decisions to the NSW Civil and Administrative Tribunal (NCAT). NCAT dismissed her appeal and confirmed the non-practising condition, relying on the evidence of one doctor who provisionally diagnosed Dr Ghosh with schizophrenia, over four other psychiatrists who did not find that Dr Ghosh had a major psychiatric illness. Dr Ghosh brought an appeal.

**Held:** granting leave to appeal and allowing the appeal: [118].

- Under s 150C of the National Law, the Council has the power to remove or alter conditions or end suspension at any time and is not conditioned on the medical practitioner lodging an appeal or demonstrating a change in circumstances: [32]-[33]. Furthermore, NCAT was required to exercise the Council's power afresh on the merits appeal, and it was of no consequence if NCAT had wrongly failed to hold that the Council erred: [34] (Simpson AJA not deciding).

- The only limitation on the types of conditions that may be imposed is that they must relate to the practitioner's practising the profession, which can include a non-practising condition: [39]-[42] (Simpson AJA dissenting).

- NCAT erred in its considerations as to what evidence was to be preferred, whether certain evidence was subject to cross-examination, and whether certain witnesses were called: [71]-[72]. It was not reasonably open to NCAT to conclude that Dr Ghosh was dishonest because she had doctored a transcript where there was an entirely innocent explanation available: [81]-[85], [111].

- The essential question for NCAT to address on a *de novo* basis was whether there was such unacceptable risk as to require immediate suspension: [88]. It did not identify the nature or extent of the risk Dr Ghosh posed, nor the unacceptable risk such as to require the termination of her right to practise: [98]. NCAT failed to address this essential question: [103].

# Australian Intermediate Appellate Decisions of Interest

## Torts: false imprisonment

***Walker v State of Queensland* [2020] QCA 137**

**Decision date:** 23 June 2020

Sofronoff P, Morrison JA, Philippides JA

In 2014 Mr Richard Walker stopped at a service station during a visit to his severely ill father in hospital. He drove out of the service station and made a U-turn, when he was intercepted by two police officers in a police car. They informed Mr Walker that he had been stopped because he had performed a burn-out and that his car would be impounded after being charged with a "hooning offence". Mr Walker stated that he was in a hurry to get back to the hospital to be with his father, but was told he could not leave. Mr Walker offered to leave his car keys with the officers and repeatedly requested to leave to visit his father, but was refused. Mr Walker was detained until a tow truck arrived and removed the car, a period of approximately two hours. Mr Walker contested the charge and was found not guilty, and then commenced proceedings against the State of Queensland for damages for false imprisonment and malicious prosecution. Mr Walker brought an appeal challenging the dismissal of his claim for damages for false imprisonment.

**Held:** judgment for Mr Walker on his claim for false imprisonment: [55].

- Impoundment is effected when the right to deal with the vehicle passes from the driver to the police officer. This happens most often when the police officer tells the driver that the vehicle has been impounded. In this case, impoundment was effected when one of the police officers told Mr Walker that his car was being impounded: [22].
- The power of restraint is a power the exercise of which is strictly limited as an aid to impoundment. The power cannot be used as an aid to serve documents on the driver of the vehicle. Whether or not the period of restraint was "reasonably necessary" to effect an impoundment is a matter of objective fact and does not vary according to the subjective judgment of the police officer concerned: [47].
- The primary judge's directions incorrectly directed the jury to regard it as their task to determine whether, irrespective of whether or not detention was required to effect impoundment, as a matter of mere practicality it was reasonable for the police officers to require Mr Walker to remain: [44].
- The effect of the directions was that the jury was never directed to consider the actual issues in the case and, as a result, there was no trial of the issues between the parties. The jury was asked to consider whether the defendant had established a defence that the law did not provide. The trial was not conducted according to law and, as a result, there was a miscarriage of justice: [50].

## Administrative Law: standing

***Maguire v Parks Victoria* [2020] VSCA 172**

**Decision date:** 25 June 2020

Ferguson CJ, Kyrou JA, Niall JA

In 2020 Parks Victoria announced without public consultation that it would immediately implement culling feral horses within the Alpine National Park by shooting. Parks Victoria has statutory responsibility for the management of the Park. The established method of control was through trapping and removal, and shooting had not previously been used. Mr Philip Maguire owns land adjoining the Park and has a strong attachment to the horses.

Mr Maguire commenced proceedings seeking declaratory and injunctive relief to restrain Parks Victoria from implementing this decision. The proceedings were dismissed by the primary judge, who held that Mr Maguire lacked a special interest in the subject matter of the proceeding and therefore did not have standing to commence the action. Mr Maguire applied for leave to appeal.

**Held:** refusing leave to appeal: [123].

- Standing is a threshold requirement and should not depend on whether the grounds might be made out or relief withheld on a discretionary basis: [76].
- The High Court has established the special interest test as the correct test for standing: [75]. It requires an intersection between the interest identified by the plaintiff and the decision that is sought to be impugned in the proceeding, and an assessment of how the interests of the plaintiff are liable to be affected by the exercise of power. Where the interest sought to be protected by the plaintiff is the public interest, there is less utility in asking whether the interest of the plaintiff is affected: [76].
- Mr Maguire had to establish that he had a special interest in the decision to cull the feral horses within the National Park rather than a more diffuse interest in brumbies or in ensuring compliance with the law: [83]. Mr Maguire's ability to participate in future consultation with Parks Victoria was the same as any other person; the potential to operate a business liable to be affected by the decision was speculative; his enjoyment of the brumbies on his land and in the adjoining Park was insufficient to establish standing; and his right or interest in enjoying the Park was no different to any other member of the community: [103], [110]-[112], [115].
- Mr Maguire did not have a special interest in maintaining the number of horses within the Park beyond an emotional attachment or affinity with the horses: [117]. The High Court has held that such interests are insufficient to establish standing: [120].

# Asia Pacific Decision of Interest

## Constitutional Rights: legal advice

***Kerr v Police*** **[2020] NZCA 245**

**Decision date:** 23 June 2020

Clifford J, Gilbert J, Wild J

In 2016 Mr Kerr was stopped by the police whilst driving in Christchurch. Mr Kerr confirmed that he had been drinking but refused a request to undergo a breath screening test. Mr Kerr agreed to accompany the police to a police station and was advised of his rights, but did not confirm that he understood them. Mr Kerr was informed that he had the right to speak to a lawyer, and he stated that he wanted to speak to a Mr Allen, who was called three times but did not answer. Mr Kerr was referred to the Police Detention Legal Assistance Scheme List and 12 phone calls were placed to lawyers on the list, none of whom answered. Mr Kerr again refused to undergo a breath test and a blood test, and was arrested. Mr Kerr was convicted of refusing to permit a blood specimen to be taken.

Mr Kerr was granted leave to appeal raising two questions regarding section 23(1)(b) of the New Zealand Bill of Rights, which provides for the right of persons arrested or detained to consult and instruct a lawyer without delay and to be informed of that right.

**Held:** allowing the appeal, quashing the conviction, entering an acquittal: [80]-[82].

- While it is not sufficient for the police simply to advise a detainee that he or she has a right to consult a lawyer, the statutory process of the drink-driving scheme cannot be unduly hindered: [33]. The Court cannot tell the executive government how to uphold the s 23(1)(b) right, and therefore the Court cannot impose an obligation on the state to facilitate the availability of legal advisers to enable the envisaged legal consultation to occur: [67]. Not every detained motorist will be able to speak to a lawyer, and practical limitations may circumscribe what can reasonably be provided by police: [69].

- The evidence before the Court showed that the use of a list rather than roster scheme meant that the executive fell short of what was required in order to uphold the right: [72]. The lawyers on the list were not, in reality, willing to provide legal services to any detained person at the relevant time. It was more likely than not that no lawyer on the list would have been able to be reached, however many attempts were made. The act of providing the list therefore provided little or no facilitation of the right: [75].

- There was a breach of Mr Kerr's right in the circumstances where calls were placed unsuccessfully to 13 lawyers: [77]. Therefore, there was no evidence upon which Mr Kerr could have been convicted of refusing to provide a blood specimen: [79].

# International Decisions of Interest

## Constitutional Law: right to an abortion

***June Medical Services L.L.C. v. Russo*** **591 U.S. ___ (2020)**

**Decision date:** 29 June 2020

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

In 2013 Texas passed legislation which required doctors who performed abortions to have admitting privileges in hospitals within 30 miles. The legislation was ruled unconstitutional by the Supreme Court in 2016.[3]

In 2014 Louisiana passed the substantially identical Act 620 which required any doctor who performed abortions to hold active admitting privileges at a hospital less than 30 miles from where the abortion was performed, which provides obstetrical or gynaecological health care services. Five abortion clinics and providers filed a lawsuit in the Federal District Court alleging that Act 620 was unconstitutional because *inter alia* it imposed an undue burden on the right of their patients to obtain an abortion. The Court held that Act 620 was unconstitutional because it imposed an undue burden on the right to an abortion without any significant health benefit, and entered an injunction permanently forbidding its enforcement. The State of Louisiana brought an appeal. A divided Court of Appeals reversed the District Court's judgment, concluding that Act 620's impact was dramatically less than that of the Texas law. The plaintiffs filed a petition for certiorari addressing the merits of the decision of the Court of Appeals.

**Held:** reversing the decision of the Court of Appeals (Thomas J, Alito J, Gorsuch J and Kavanaugh J dissenting).

- Per Roberts CJ concurring, the Court was bound to apply the precedent from the nearly identical Texas law in holding that Act 620 was unconstitutional: p. 16.
- There was ample evidence to support the District Court's finding that Act 620 did not further the State's asserted interest in protecting women's health: p. 2. The finding that the admitting-privileges requirement served no relevant credentialing function was not demonstrated to be clearly erroneous: p. 36.
- The District Court held that Act 620 was an unnecessary health regulation that had the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion, imposing an undue burden on the right to an abortion and was therefore constitutionally invalid. The Court faithfully applied this standard, weighing the law's asserted benefits against the burdens it imposed upon abortion access. The Court's findings and the evidence it relied upon were sufficient to support its conclusion that the law would make it impossible for many women to obtain a safe, legal abortion in the State and imposing substantial obstacles on those who could: pp. 19-35.

[3] *Whole Woman's Health v Hellerstedt* 579 U.S. ___ (2016)

## Intellectual Property: patents

***Regeneron Pharmaceuticals Inc v Kymab Ltd*** **[2020] UKSC 27**

**Decision date:** 24 June 2020

Lord Reed P, Lord Hodge, Lady Black, Lord Briggs, Lord Sales

Mice have been identified as suitable platforms for the development of antibodies for use in treatment of humans. However, two problems inhibit the use of mice: humans tend to reject murine antibodies; and the production of human antibodies by mice causes a reduced immune response and reduced development of suitable antibodies, impairing their efficiency as platforms for antibody development. Regeneron Pharmaceuticals developed and obtained patents relating to a hybrid (chimeric) antibody gene structure created by insertion into the genome of the mouse. They alleged infringement by Kymab of certain claims in these patents.

The trial judge found infringement had been proved, but held that all claims were invalid for insufficiency as the teaching in the patent did not enable any type of mouse within the range to be made. On appeal, the Court of Appeal held that the sufficiency requirement was satisfied, because the invention amounted to an inventive, ground-breaking general principle, such that every type of mouse with the specified characteristics would display the particular benefits which the invention was designed to achieve.

The question on appeal was whether a product patent, the teaching of which enables the skilled person only to make some, but not all, of the types of product within the scope of the claim, passes the sufficiency test where the invention would contribute to the utility of all the products in the range.

**Held:** allowing the appeal: [61].

- Sufficiency is an established tool to measure the correspondence between the protection afforded by the claim and the technical contribution made by the disclosure of the invention in the patent. Where the invention enables patentees to make a particular product, and they seek a monopoly over the making and exploitation of the product, they must disclose enough in the teaching of the patent to enable the public also to make the product: [23].

- Sufficiency requires substantially the whole of the range of products within the scope of the claim to be enabled to be made by means of the disclosure in the patent. The contribution to the art is measured by the products which can thereby be made as at the priority date, not by the contribution which the invention may make to the value and utility of products in the future: [60].

- At the priority date the disclosure of the two patents, coupled with the common general knowledge, did not enable transgenic mice to be “made” with a Reverse Chimeric Locus containing more than a very small part of the human variable region gene locus. The claim to a monopoly over the whole of that range went far beyond the contribution which the product made to the art at the priority date, precisely because mice at the more valuable end of the range could not be made using the disclosure in the patents: [57].