Court of Appeal
Supreme Court
Sydney

Decisions of Interest

4 July 2020 – 17 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

Negligence: injury during serious offence

***SW v Khaja* [2020] NSWCA 128**

Decision date: 14 July 2020

McCallum JA, Emmett AJA, Simpson AJA

In 2015 SW took a taxi driven by Mr Khaja from Ambervale to Campbelltown, when a struggle between them erupted and SW fell from the car. The rear wheels of the vehicle passed over SW, causing grave injury resulting in paraplegia. SW sued Mr Khaja claiming damages on the basis of negligence, alleging that he drove at an excessive speed, failed to maintain control over the taxi, drove in a dangerous manner, failed to exercise due and proper care and failed to slow down or stop to avoid running over SW. The primary judge allowed SW to expand the case during the hearing to include the allegation that Mr Khaja pushed SW from the moving car. Mr Khaja alleged that SW had produced a knife and demanded Mr Khaja's money, wallet and phone.

The primary judge accepted that there was an attempt to rob the taxi driver and SW was engaged in an illegal enterprise. Therefore, section 54 of the *Civil Liability Act 2002* (NSW) prohibited the award of damages as the injury occurred at the time of conduct constituting a serious offence which materially contributed to the injury. SW brought an appeal challenging the finding that she had attempted to rob Mr Khaja with a knife.

Held: dismissing the appeal: [107].

- The evidence supported the primary judge's finding that SW had a knife and attempted to rob Mr Khaja: [76]. The finding that Mr Khaja's act of pushing SW was in self-defence was inevitable, based on the finding of attempted armed robbery: [87]. Therefore, the primary judge was correct in finding that Mr Khaja did not owe SW a duty of care, or if he did, he did not breach that duty: [91]. Furthermore, the judge was also correct in finding that SW was guilty of contributory negligence: [103].

- The primary judge found that SW's commission of the offence of armed robbery was "the dominant and immediate cause" of her harm. In that context, a finding that SW's criminal conduct "contributed materially" to her harm was so obvious it went without saying: [82]. Once it was determined that s 54 applied, it was immaterial whether any conduct of Mr Khaja materially contributed to the injuries sustained by SW: [88].

- There was no merit in the ground that the primary judge erred in failing to find that any illegal conduct on the part of SW ceased when she attempted to exit the taxi. SW was attempting to flee from the scene of her unsuccessful attempted armed robbery. Section 54 precludes the recovery of damages for injury suffered even while abandoning a criminal enterprise, as it refers to injury "following" conduct that constitutes a serious offence: [86].

Corporations: authority

***Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation* [2020] NSWCA 144**

Decision date: 13 July 2020

Bathurst CJ, Bell P, Gleeson JA

Left Bank Investments Pty Ltd owned premises in Lismore which were leased to Ngunya Jarjum Aboriginal Corporation. The registered lease was for a term of 5 years commencing in May 2012 and contained an option to renew. The 2012 lease was purportedly signed on behalf of the Corporation on about 14 May 2012 by Ms Marlowe and Ms Browning, each of whom was described in the attestation clause of the lease as a director of the Corporation. In fact, Ms Browning was a director, but Ms Marlowe was the Chief Executive Officer.

In March 2017 the premises were inundated by flood waters. The Corporation was forced to vacate in June 2017. A dispute arose between the parties as to who was responsible for replacement of the carpet and other damaged items.

In October 2017 Left Bank commenced proceedings against the Corporation alleging that the Corporation was bound by a new lease for a term of 5 years commencing May 2017. Left Bank claimed rent unpaid under the new lease, together with damages for alleged breaches of certain clauses of the 2012 lease. These claims turned on whether there was a concluded agreement for lease and whether the Corporation was bound by the conduct of Ms Marlowe. On appeal, Left Bank challenged the finding that Ms Marlowe lacked authority to communicate the Corporation's acceptance of Left Bank's offer of a new lease.

Held: dismissing the appeal: [123].

- Actual authority arises where a principal grants and an agent accepts authority for the agent to perform specific tasks on behalf of the principal: [63]. An agent cannot have implied actual authority to inform an offeror that an offer has been accepted when no decision has been made by the principal to accept it: [67].
- The evidence relied upon by Left Bank, including building work, a statement on the Corporation's website, payment of monthly rent and Board minutes, could not support the inference that the Board had agreed to the new lease proposal: [88]. No inference of implied actual authority was drawn from the conduct of the Corporation and Ms Marlowe: [95].
- There was no error in the finding that there was no prior course of dealing in which the Corporation held out Ms Marlowe to Left Bank as having authority to communicate the Corporation's acceptance of the new lease: [108].
- No alternative claim was pleaded or advanced at trial for unpaid rent following the expiry of the 2012 lease and not giving sufficient notice before it vacated. Left Bank should not be permitted to advance a new case on appeal which it failed to put during the hearing when it had an opportunity to do so: [120]-[121].

Valuation of land: hypothetical development

***Coffs Harbour City Council v Noubia Pty Ltd* [2020] NSWCA 142**

Decision date: 15 July 2020

Bathurst CJ, Bell P, Basten JA

The Lakes Estate is a residential development on the south-west side of Coffs Harbour, located within an alluvial flood plain. Pursuant to a development consent given to Noubia Pty Ltd in 2003, three parcels of land were vested in the Coffs Harbour City Council. Noubia, as the developer and owner of the land, sought compensation for the land pursuant to a condition of the consent. The Council agreed to payment of an amount of $110,000 with respect to lots 94 and 163, but denied liability to pay compensation for lot 96.

Noubia commenced proceedings in the Land and Environment Court seeking valuation declarations. Noubia valued lots 94 and 163 according to an alternative hypothetical development, which it contended was the "highest and best use" of the land. This would have allowed for a further 35 residential dwellings at a net value of over $100,000 per lot. However, this development dealt only with water emanating from the hypothetical development, and there was substantial evidence that Council would not approve a development that did not include a scheme for the detention and management of upstream water flows onto the land. The primary judge declared that Noubia was entitled to compensation with respect to lot 96 and identified the compensation payable with respect to lot 94 as $3,256,000 and lot 163 as $560,000. The Council brought an appeal challenging those orders.

Held: allowing the appeal: [127].

- All land is subject to constraints on use, deriving from natural features or planning constraints, including Noubia's development site. It was subject to stormwater both due to water collecting on the site itself, and water flowing from upstream land. The need to deal with upstream flows was both a consequence of the natural topology and a feature which affected surrounding landowners, therefore containing a public element: [81].

- If Noubia's alternative development would not have been approved, it was not available and therefore was not the financially most advantageous development. There was substantial evidence that the Council would not have approved a development which did not provide for the detention and management of upstream flows onto the land: [82]-[84]. Noubia's alternative could not be assumed to be an acceptable development which would receive development consent: [90].

- The trial judge did not resolve the critical issue of the public purpose, which should have been dispositive of the case. The judge's valuation of lots 94 and 163 was set aside: [87]-[88]. It was not open to the Court of Appeal to exercise the evaluative judgment conferred on the Land and Environment Court in this regard and the matter was remitted for determination in that Court: [125].

Australian Intermediate Appellate Decisions of Interest

Adoption

***S and N v T* [2020] ACTCA 36**

Decision date: 10 July 2020

Elkaim J, Robinson AJ and Crowe AJ

QS, a seven year old child, has been in the foster care of the appellants since she was a few months old. The appellants brought an application to dispense with the requirement to obtain consent from the birth mother in order to proceed with their adoption application, a requirement under s 26 of the *Adoption Act 1993* (ACT). The birth mother opposed the adoption and had been seeking to increase contact with her child, with a view to allowing the child to reside with her in later years. A prior application for dispensation had been made by the appellants, which was dismissed as premature where proceedings were underway in the Children's Court which had the potential to increase the contact between QS and the birth mother.

The primary judge refused the application to dispense with the consent, finding that she was not satisfied that the birth mother had failed to discharge her parental obligations for more than a year, or that she had failed to do so without reasonable excuse, per section 35(1)(d) and (e) of the Act. The appellants brought an appeal.

Held: allowing the appeal and remitting the matter for further hearing: [69].

- Any decision made under the Act must be made in the context that the paramount consideration, or the most important or pre-eminent consideration, will be the best interests of the relevant child: [60].
- In addressing the question of whether the dispensation order should be made, her Honour fell into error in applying an onus of satisfaction which went beyond that required by the Act itself. While it is a serious and grave decision to transfer the parental responsibility for a child away from birth parents to others, such a consideration should not divert the Court from the application of the statute according to its terms. Reference to terms such as the "heavy onus" to be discharged and the "exceptional" step of making a dispensation order were apt to lead the Court to set the bar too high in making the evaluative decisions required by the Act: [64].
- The crucial, if not determinant, consideration to the dispensation decision is whether or not it would be in QS's best interests for the adoption order to be made in favour of the appellants. It is mandatory for the Court making that assessment to consider the s 39D report on proposed adoption. As such reports remain confidential unless the Court orders otherwise, the Court of Appeal declined to take it into account in determining the appeal: [52]. Therefore, the Court could not determine the application and it was required to be remitted for re-determination: [68].

Representative Proceedings: class members

***Dyczynski v Gibson* [2020] FCAFC 120**

Decision date: 7 July 2020

Murphy J, Lee J, Colvin J

In July 2014 Dr and Mrs Dyczynski's daughter Fatima was flying to Australia from Amsterdam, where she was studying, to visit her parents. She was a passenger on board Malaysian Airlines flight MH17 which was shot down over Ukraine, killing all passengers and crew on board. The appellants entered into a written retainer agreement with LHD Lawyers in relation to Fatima's death, including commencing a claim under the Montreal Convention in a court of competent jurisdiction. In July 2016 LHD commenced a class action in the Federal Court, with Ms Gibson as the representative applicant. LHD advised the appellants that they met the class description and were therefore class members, but filed submissions in July 2018 that formally conceded that the Court did not have jurisdiction to determine the appellants' claim without informing them. A settlement was reached and approved by the Federal Court which did not include the appellants.

In July 2019 the appellants were informed by LHD that they did not satisfy the definition of group member. The appellants filed an application which sought clarification that they were group members. The primary judge declared that they were not class members. The appellants brought an appeal.

Held: allowing the appeal and setting aside the declaration: [27].

- To have a "claim" is not to say that the person has a right or entitlement to relief; but rather that there exists facts, circumstances and legal rights which *may* ground a right or entitlement to relief when that person's claim is ultimately heard and determined by the Court: [168]. LHD's concession that the appellants were no longer class members could not of itself be determinative of whether the appellants were class members or to finally determine their claim: [198].

- The appellants satisfied the class description as it was defined in the statement of claim when the class action commenced: [174]. However, the class description was amended to exclude persons who could not meet the jurisdictional requirements of the Convention. The primary judge erred in finally determining this question when it could only be determined on notice to the appellants and with an opportunity for them to put on evidence following being properly apprised of the issue for determination: [227].

- The appellants suffered procedural unfairness principally as a consequence of the conduct of LHD and counsel: [159]. In acting for the representative applicant, LHD was obliged to act consistently with the representative applicant's fiduciary obligations to the class members. It was necessary for LHD to notify affected class members of the procedure for determination of the jurisdiction over their claim so that they could decide whether and how to best protect their interests: [210].

Asia Pacific Decision of Interest

Statutory Interpretation: ordinary consequence

***Accident Compensation Corporation v Ng* [2020] NZCA 274**

Decision date: 7 July 2020

Kós P, French J, Goddard J

Section 32 of the *Accident Compensation Act 2001* provides cover for "personal injury by accident" where a person suffers a personal injury, such as a medical misadventure, which satisfies four pre-requisites, including that it was not a necessary part or ordinary consequence of the treatment.

Three test cases came before the primary judge raising an issue of interpretation relating to the meaning of "ordinary consequence". Two of these cases led to these proceedings. In one, Ms Ng suffered a significant stroke following emergency surgery to treat three anterior choroidal artery aneurysms, which had a risk of 16-22% of eventuating. In the other, Ms L developed right leg paralysis and other neurological deficits following surgery to remove a spinal malformation, which had a 10-38% risk of eventuating. The Accident Compensation Corporation declined cover on the grounds that the injury in each case was an ordinary consequence of the relevant treatment. These decisions were reversed on appeal in the District Court. The Accident Compensation Corporation obtained leave to appeal to the High Court on questions of law centring on the correct interpretation of "ordinary consequence".

Held: allowing the appeal and quashing the primary decision: [77].

- As a matter of plain language and legislative purpose, the phrase "ordinary consequence" is not capable of bearing the meaning "a consequence more probable than not": [62]. If Parliament had intended "ordinary" to mean "more likely than not", there are well established phrases which it could have used to express that idea, which it did not: [64]. Parliament chose to use an imprecise test. The Court would be straying beyond its proper function to disregard that and superimpose a structure of its own creation: [72].
- "Not an ordinary consequence" should be interpreted as meaning an outcome that is outside of the normal range of outcomes, something out of the ordinary which occasions a measure of surprise: [67]-[68].
- Whether an adverse consequence is inside or outside the normal range of consequences of the medical treatment given to a particular claimant is ultimately a matter of judgment for the decision maker, exercised on a case-specific basis. Relevant circumstances will include the nature of the harm suffered, its duration and severity, and may be informed by medical studies including relevant statistical analysis and the clinical experience of the treating physicians and other specialists: [69].

International Decisions of Interest

Constitutional Law: division of powers

***Reference re Genetic Non-Discrimination Act*, 2020 SCC 17**

Decision date: 10 July 2020

Wagner CJ, Abella J, Moldaver J, Karakatsanis J, Côté J, Brown J, Rowe J, Martin J, Kasirer J

In 2017 the Canadian Parliament enacted the *Genetic Non-Discrimination Act*, which criminalised compulsory genetic testing and the non-voluntary use or disclosure of genetic test results for activities including contracting and the provision of goods and services. The Government of Quebec referred the constitutionality of sections 1 to 7 of the Act to the Quebec Court of Appeal, which concluded that these provisions were *ultra vires* the jurisdiction of Parliament over criminal law under the Constitution. The Canadian Coalition for Genetic Fairness, which had intervened in the Court of Appeal, brought an appeal.

Held: allowing the appeal and answering the reference question in the negative, holding that the Act was not *ultra vires* the jurisdiction of Parliament: [108] (Wagner CJ, Brown J, Rowe J and Kasirer J dissenting).

- The wisdom of Parliament's decision to criminalise the conduct was not in issue. It was not the Court's task to consider whether the policy objectives advanced by the provisions could be better achieved by other means: [15].
- A law will have a criminal law purpose if its matter represents Parliament's response to a threat of harm to public order, safety, health, morality or fundamental social values, or to a similar public interest. As long as Parliament is addressing a reasoned apprehension of harm to one or more of these public interests, no degree of seriousness of harm needs to be proved before it can make criminal law: [79].
- Parliament's concern was that individuals' vulnerability to genetic discrimination posed a threat of harm to several public interests traditionally protected by the criminal law. Parliament enacted legislation that, in pith and substance, protects individuals' control over their detailed personal information disclosed by genetic tests in order to address Canadians' fears that their genetic test results will be used against them and to prevent discrimination based on that information. It did so to safeguard autonomy, privacy and equality, along with public health. The challenged provisions fell within Parliament's criminal law power because they consisted of prohibitions accompanied by penalties, backed by a criminal law purpose: [103].
- Kasirer J dissenting: the pith and substance of sections 1 to 7 was to regulate contracts and the provision of goods and services by prohibiting some perceived misuses of one category of genetic tests, with a view to promoting the health of Canadians. The impugned provisions cannot be classified as a valid exercise of Parliament's constitutional power over criminal law: [154].

Constitutional Law: executive power, separation of powers

***Trump v. Vance* 591 U.S. ____ (2020)**

Decision date: 9 July 2020

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

Article II of the US Constitution established the executive branch of the federal government, including the office of the President of the US. The Supremacy Clause established that the Constitution and federal laws take precedence over state laws.

In 2018 the New York County District Attorney's Office opened an investigation into "business transactions involving multiple individuals whose conduct may have violated state law." It served a subpoena on Mazars USA LLP, the personal accounting firm of President Trump, directing the production of financial records relating to the President and business organisations affiliated with him. This was the first state criminal subpoena directed to a President of the US. The President sued the district attorney and Mazars to enjoin enforcement of the subpoena.

The District Court dismissed the case based on the principle which precludes federal courts from intervening in ongoing state criminal prosecutions. The Court of Appeals agreed with the District Court's denial of a preliminary injunction on the merits. The question before the Supreme Court was whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

Held: affirming the judgment of the Court of Appeals and remanding the case for further proceedings consistent with the opinion: p. 22 (Thomas J and Alito J dissenting).

- A properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties: p. 13. There is nothing inherently stigmatising about a President performing the normal citizen duty of furnishing information relevant to a criminal investigation: p. 14.
- Grand juries are prohibited from engaging in "arbitrary fishing expeditions" and initiating investigations "out of malice or an intent to harass". Absolute immunity is not necessary under Article II or the Supremacy Clause: p. 17.
- There is no need for a state grand jury to satisfy a heightened need standard for seeking a President's private papers because they stand in nearly the same situation as any other individual; it is not necessary for the Executive to fulfil its Article II functions; and the public interest in fair and effective law enforcement cuts in favour of comprehensive access to evidence: pp. 17-19.
- Rejecting a heightened need standard does not leave Presidents with "no real protection" as they may avail themselves of the same protections available to every other citizen; they can raise subpoena-specific constitutional challenges; and they can argue that compliance with a particular subpoena would impede their constitutional duties: pp. 19-21.