Court of Appeal
Supreme Court
Sydney

Decisions of Interest

12 September 2020 – 25 September 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

Torts: assault and battery

Owlstara v State of New South Wales **[2020] NSWCA 217**

Decision date: 15 September 2020

Basten JA, Meagher JA, Emmett AJA

In September 2013 Lytha Owlstara was arrested by a highway patrol officer on driving related offences. She had been followed by a police car with its lights flashing and siren sounding for 3km until she pulled into her own driveway and stopped the car in her garage. The police officer ran into the garage with his firearm drawn, ordered her to leave the car and pointed his gun at her chest. He placed her in handcuffs and waited until assistance arrived to provide transport to a police station. Ms Owlstara brought claims for damages for assault, battery and false imprisonment against the police involved in relation to their conduct. These claims failed because the primary judge was satisfied that the conduct was in conformity with the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) and was therefore lawful. Ms Owlstara brought an appeal.

Held: allowing the appeal and giving judgment for Ms Owlstara in the sum of $115,000: [102].

- If Ms Owlstara had exited the vehicle and entered the residence unseen, her identity was capable of being a matter about which evidence might have been fabricated. However, there was at the time of arrest nothing to indicate that preventing such fabrication required more of Constable Hurtak than his observing Ms Owlstara in the vehicle, and requiring her to confirm her identity by producing her driver's licence: [51].
- Constable Hurtak's evidence confirms what is suggested by the video recording of events following his arrival at Ms Owlstara's property, namely that he formed the intention to arrest the driver of the vehicle before he entered the garage and for reasons that did not consciously include any purpose of preventing reoffending or fabrication of evidence. That tells against his having reasonable grounds: [62]. Constable Hurtak had coercive powers short of arrest available to ascertain Ms Owlstara's identity, the only information he required to ensure she was charged: [63].
- The evidence did not justify a conclusion that there were reasonable grounds for any suspicion of Constable Hurtak that arrest was necessary for either of the purposes in LEPRA ss 99(3)(b) or (e). Ms Owlstara's arrest was unlawful and her claim for false imprisonment was made out. Her claim for battery, in respect of her handcuffing, was also made out: [65].
- There was no basis in the evidence for concluding that the pointing of Constable Hurtak's firearm at Ms Owlstara was reasonably necessary for the exercise of whatever function he was seeking to perform per LEPRA s 230: [81].

Equity: proprietary estoppel

Q (a pseudonym) v E Co (a pseudonym) **[2020] NSWCA 220**

Decision date: 21 September 2020

Meagher JA, Leeming JA, Payne JA

Q is the father of A, B and C. E Co and EM Co are companies in which Q and his sons hold an equal shareholding interest, and the sons are the directors of those companies. From 2002 there were discussions between the sons, Q and his advisors concerning how Q would pass his wealth to them. The sons' expectation, as understood by their father, was that he intended that they and their families inherit his wealth. It was agreed that each of the sons would have a role and shareholding interest in E Co and its business. Thereafter the three sons joined in that family business, relying on the expectation induced by Q that he would make various farms available to the new family business, hold them for his sons during his lifetime, and leave them or the proceeds of their sale to the sons on his death.

In 2013, Q served a notice of termination of lease on E Co. Q made a new will, leaving the residue of his estate to a discretionary trust controlled by Q's sister. The sons brought a claim against their father based on a proprietary estoppel by encouragement, seeking by way of equitable relief that he make good an expectation, on which each relied to his detriment, that on Q's death he would leave his farm properties to them. The primary judge upheld the sons' claims. Q brought an appeal challenging this outcome.

Held: dismissing the appeal: [204].

- Q intended that the new family business structure would provide the means by which his wealth was passed on to his sons. The sons shared, and acted on the basis of, his understanding of that "whole concept": [66]. Q's participation in the conception and implementation of the new structure did not involve his merely standing by, and was not ambiguous. Q demonstrated clearly his own understanding of what he had committed to implementing with his sons. In all the circumstances, there was nothing unreasonable in the sons understanding Q's conduct as they did, which was largely as he did: [67].

- The expectation found by her Honour was a 'floating' or 'ambulatory' expectation which 'attached' to and included farm properties subsequently acquired by Q for use by E Co for the purposes of the family farming business: [71]. The sons did not put their claim as separate estoppels in relation to the after-acquired properties, rather there was continuing detrimental reliance on a unitary expectation at all relevant times. The elements of a proprietary estoppel by encouragement were established on and from the acquisition of each of the properties acquired after 1 July 2003: [86].

- Conscience did not require Q to make nor entitled his sons to receive an unqualified present gift of the farm properties: [175]. What good conscience required must be understood by reference to the position which would have obtained had the expectation been made good, but not accelerated: [177].

Administrative Law: vexatious proceedings

***Minister for Education and Early Childhood Learning v Zonnevylle* [2020] NSWCA 232**

Decision date: 24 September 2020

Macfarlan JA, Leeming JA, McCallum JA

Peter Zonnevylle made an application to the NSW Civil and Administrative Tribunal (NCAT) for review of a decision under the *Government Information (Public Access) Act 2009* (NSW) ("review application"). At the time Mr Zonnevylle filed the review application, it was based on the deemed refusal of an access application he had made, the relevant agency having failed to determine the access application within the required period: s 63(1) of the Act. However, less than a week after the review application was filed, the Minister proceeded to decide the access application, as allowed under s 63(2) of the Act. While some documents were provided, the Minister's decision as to most of the categories of information sought by Mr Zonnevylle was that the information was "not held" by the Minister.

After deciding the access application, the Minister sought to have the NCAT review application summarily dismissed. NCAT was satisfied that Mr Zonnevylle was raising an issue as to the reasonableness of the Minister's searches for the information sought, which NCAT accepted was within its jurisdiction. The Minister renewed the application to have the whole of the proceedings dismissed on the ground that they were vexatious. NCAT acceded to that application and dismissed the proceedings. Mr Zonnevylle brought an appeal to the Appeal Panel of NCAT. The Appeal Panel upheld the appeal and set aside the order dismissing the review application. The Minister sought leave to appeal from the Appeal Panel's decision.

Held: granting leave, setting aside the orders of the Appeal Panel: [59].

- The vexation lay in the combination of the fact that the claims were bad in law, the fact that they had been dismissed on that basis in the first decision of NCAT, and Mr Zonnevylle's demonstrated determination to persist in maintaining the same allegations and urging NCAT to determine them. It was wrong to hold that *persistence* in making claims which are "bad in law" does not fall within the collateral purpose principle: [44]. An attempt to re-litigate a matter that has already been determined may amount to an abuse of process. The decision of the Appeal Panel did not explain why Mr Zonnevylle's persistence in serious allegations of misconduct, which had already been dismissed by NCAT for want of jurisdiction, did not demonstrate use of the proceedings for a collateral purpose: [48].
- The history of Mr Zonnevylle's proceedings demonstrated a determination to persist in the pursuit of allegations previously found to have been baseless and to persist in wasting NCAT's time and resources by urging it to make findings it had no power to make. The history was plainly relevant and the Appeal Panel was wrong to disregard that material: [53].

Succession: family provision

***Megerditchian v Khatchadourian* [2020] NSWCA 229**

Decision date: 25 September 2020

Macfarlan JA, Payne JA, Emmett AJA

Vanoush Megerditchian successfully sought provision under the *Succession Act 2006* (NSW) out of the estate of her late father, Souren Mihran Khatchik Khatchadourian, who died in May 2018. Souren's major asset was the family home in Willoughby. Souren and his wife lived there, together with his son Hampartzoum Khatchadourian, and later, Hampartzoum's family.

Under Souren's last will, Souren left a legacy of $10,000 to Vanoush and the rest of his estate to Hampartzoum. On Souren's death, his share of the property passed to Hampartzoum. Souren's estate consisted of approximately $5,000 held in two bank accounts. There were no funds to pay the $10,000 legacy to Vanoush. Vanoush contended that she was entitled to a provision of between $975,000 and $1,320,000 from Souren's estate. The primary judge determined that the provision for Vanoush of $100,000 should be made and made an order designating a half share of the property as notional estate to enable that payment to be made.

Held: dismissing the appeal: [66].

- The question of whether adequate provision for the proper maintenance, education or advancement in life of the claimant has not been made by the will, within the meaning of s 59(1)(c) of the *Succession Act*, is the equivalent of a discretionary decision. Review was therefore subject to the restraints identified in *House v The King*: [29]. Four of Vanoush's grounds, whilst couched in the language of *House v The King*, involved an appeal on the merits. Vanoush sought to have the Court re-exercise the broad evaluative discretion of the primary judge: [37]. Vanoush did not establish a *House v The King* error: [44]-[46].
- The structural changes between the *Family Provision Act 1982* (NSW) and Chapter 3 of the *Succession Act* mean that a two-stage analysis for claims for family provision orders is generally no longer appropriate: [33].
- The *Succession Act* gives the Court an evaluative discretion which is fact-specific. It does not prescribe an order being made wherever a child has a demonstrated need for provision, much less dictate the amount of that order if made: [52].
- The case involved a modest estate and a strong competing claim. Vanoush had no entitlement to anything other than an amount which was adequate and proper, weighing up all of the s 60(2) factors: [63]. It was for the primary judge to determine the weight to be given to these factors: [43].

Administrative Law: judicial review

***Commissioner of Police, New South Wales Police Force v Zisopoulos* [2020] NSWCA 236**

Decision date: 28 September 2020

Bell P, Macfarlan JA, Wright J

The Police Commissioner decided to remove George Zisopoulos from the NSW Police Force pursuant to s 181D(1) of the *Police Act 1990* (NSW). The basis of the decision was the Police Commissioner's satisfaction to the *Briginshaw* standard that Mr Zisopoulos consumed a prohibited drug which resulted in his testing positive for prohibited drugs. Mr Zisopoulos filed a successful application for relief in relation to unfair dismissal in the NSW Industrial Relations Commission (IRC) which resulted in an order for his reinstatement. The Police Commissioner brought an unsuccessful appeal to the Full Bench of the IRC. Both decisions held that, if an applicant for review produced sufficient evidence to "cast doubt" upon the reasons of the Police Commissioner, the Police Commissioner would then bear the evidential burden of establishing that the applicant had engaged in the relevant misconduct that led to the removal. The Police Commissioner sought judicial review of the Full Bench's decision and an extension of time to seek judicial review of the IRC commissioner's decision.

Held: by majority, dismissing the summons: [94].

- Assessment as to whether a particular decision of the Police Commissioner engaged the statutory criteria necessarily must have regard to the basis and reasoning employed by the Police Commissioner: [83]. The burden of establishing that a decision to remove a police officer was harsh, unreasonable or unjust may be satisfied in a given case by casting sufficient doubt on the Police Commissioner's reasoning process so as to justify the IRC's intervention: [84]. If "sufficient doubt" is raised by the removed officer, an evidentiary or tactical burden may arise which will require the Police Commissioner to answer the doubt in order to defeat the open conclusion that the impugned removal decision was harsh, unreasonable or unjust: [85].

- Neither the Full Bench nor the IRC commissioner held that the Police Commissioner had any legal burden. The *Briginshaw* standard was the standard that the Police commissioner had set for his own decision making. Both decisions held that the standard was not satisfied on the material, which meant that an important underlying basis for the Police Commissioner's removal decision was rendered insecure in a material way: [89].

- Wright J dissenting: the IRC commissioner placed the burden of proof and persuasion on the Police Commissioner in relation to whether Mr Zisopoulos' positive test results were caused by misconduct by the voluntary ingestion of illicit drugs, after at least some doubt had been cast by Mr Zisopoulos on the Police Commissioner's findings: [184]. The IRC commissioner identified a wrong issue and asked himself the wrong question. He also failed to exercise the jurisdiction conferred on the IRC or he exceeded the authority or powers given by those provisions. Accordingly, the IRC commissioner's decision was affected by jurisdictional error and was liable to be set aside: [201]-[202].

Australian Intermediate Appellate Decisions of Interest

Liquor Licensing

***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2020] WASCA 157**

Decision date: 24 September 2020

Quinlan CJ, Buss P, Vaughan JA

In 2014 the Australian Leisure and Hospitality Group (ALH) lodged an application for approval to redevelop the Leisure Inn in Rockingham pursuant to s 77 of the *Liquor Control Act 1988* (WA). The application concerned an increase of the approved licensed area to open a Dan Murphy's liquor outlet. The Director of Liquor Licensing had decided that s 38(2) of the Act applied to the application, and therefore ALH was required to satisfy the licensing authority that granting the application was in the public interest. In 2017 the Liquor Commission granted ALH's application. The Commissioner of Police appealed against the Commission's decision. The primary judge allowed the appeal, quashed the Commission's decision and remitted the application to the Commission. ALH brought an appeal. The issue on appeal was the proper construction of the Act, and in particular whether, in determining the 'public interest' for the purpose of s 38 of the Act, the Commission may have regard to potential economic benefits that might accrue from the grant of the application, but which were not concerned with the liquor, tourism and other hospitality industries or the use and development of licensed premises.

Held: dismissing the appeal: [62], [236].

- The critical statutory context in determining the ambit of permissible public interest considerations is the Act's subject matter, scope, purpose, primary and secondary objects and long title: [32]. The expression 'in the public interest', when used in a statute, imports a discretionary value judgment. If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will be confined only by the subject matter, scope and purpose of the statute: [165].

- Economic benefits of some kinds were a permissible consideration on ALH's application. The relevant public interest included the proper development of the liquor, tourism and other hospitality industries and the use and development of licensed premises. However, the economic benefit factors relied on by the Commission were not of this type and were not permissible considerations in evaluating the public interest: [55]-[56].

- The granting of the application may have positive effects or consequences upon the overall character, quality and enjoyment of life within the locality as a result of the expenditure of money on or in connection with the licensed premises or proposed licensed premises. However, relevant effects or consequences do not include, of themselves, general economic benefits from the development and use of licensed premises: [186].

Asia Pacific Decision of Interest

Criminal Law: alternative verdicts

Reference by the Principal Legal Adviser Pursuant to Section 26 of the Supreme Court Act, Re Section 539 of the Criminal Code **[2020] PGSC 79**

Decision date: 15 September 2020

Salika CJ, Kirriwom J, Batari J, Mogish J, Cannings J

A young man was charged by indictment with one count of wilful murder. There was no other charge on the indictment. The trial judge found it proven beyond reasonable doubt that the accused killed the deceased, but not proven that the accused intended to kill him. The trial judge entered a verdict of not guilty of wilful murder and decided that the accused could not be convicted of murder as he had not been charged with murder. The trial judge held that the indictment had to contain an alternative charge of murder or manslaughter before an alternative verdict could be entered. As it did not, the accused was entitled to an acquittal.

The Principal Legal Adviser referred a point of law to the Supreme Court of Papua New Guinea, being whether it was necessary, in order for the National Court to enter a conviction for murder or some lesser offence, for an alternative charge to be included on an indictment that charges an accused with wilful murder.

Held: answering the reference in the negative: [43].

- There is no general principle that if a person has been charged with a specific offence and, though not all elements of it are proven, all elements of a lesser offence are proven, the court can enter a conviction for the lesser offence: [26]. However, it has been almost invariably the practice in wilful murder cases for the court to enter a conviction for murder or manslaughter, depending on the evidence: [32].
- The Court held that the statutory language and the alternatives provided for were sufficiently clear: [35]-[37]. On an indictment charging a person with wilful murder, a court can convict the person of murder, even if there is no murder charge on the indictment: [38]. This does not produce unfairness to the accused, as the accused still has the full protection of the law and is still innocent until proven guilty, the normal rights that an accused has under the Constitution: [39].
- It is not only the Public Prosecutor who has the power to decide what charge should be faced by the accused, and to expect the Court to consider alternative verdicts does not amount to the Court entering into the exclusive domain of the Public Prosecutor: [40].
- The trial judge did not give full consideration to the constitutional imperative to give paramount consideration to the dispensation of justice. His Honour allowed a person who has been proven to have committed the crime of murder, to escape conviction on a technicality: [42].

International Decision of Interest

Torts: negligence

***Bruno v. Dacosta*, 2020 ONCA 602**

Decision date: 23 September 2020

Lauwers JA, Brown JA, Nordheimer JA

In August 2016 Paul Bruno was an inmate being held in protective custody at the Niagara Detention Centre ("NDC"). The trial judge found that four inmates assaulted Mr Bruno in the washroom of the wing in which they were all housed. Mr Bruno suffered serious personal injuries and was found unconscious. The issue before the trial judge was whether the Crown was liable to Mr Bruno in negligence because NDC employees failed to take reasonable steps to protect him as a vulnerable inmate. The trial judge found two breaches of the standard of care: first, the standard required that certain inmates be kept separate from Mr Bruno and not be housed together; and, second, the standard required NDC staff to consult with inmates about potential incompatibilities before Mr Bruno was placed into protective custody. However, because Mr Bruno did not speak up when he noticed the presence of an old enemy in the wing, the trial judge found Mr Bruno contributorily negligent. The Crown brought an appeal in the Ontario Court of Appeal seeking dismissal of the action and Mr Bruno brought a cross-appeal challenging the finding of contributory negligence.

Held: remitting the case for retrial: [11].

- The province of Ontario can only be held vicariously liable for the negligent acts or omissions of an individual correctional officer who, in the course of employment by Ontario, did or failed to do something, thereby creating a foreseeable risk of harm to the inmate. The statute provides that the province's liability must derive from actionable negligence of specific correctional officers: [33]-[34].

- Insufficient reasons necessitate a new trial where the appellate court is unable to salvage the decision based on the available record: [21]. In assessing the trial judge's reasons for sufficiency, the reviewing court must examine the evidence and determine whether the reasons for judgment are patent on the record. However, there are limits on the appellate court's ability to fairly and justly salvage a trial decision: [23]-[24]. The court usually declines to dig into the record in order to salvage a decision where the trial decision turns on instances of conflicting evidence, evaluations of credibility and reliability, and exercises of discretion that are properly within the purview of a trial judge: [25].

- In the context of the substantive written submissions provided by the parties, the trial judge's reasons were not intelligible or transparent and did not adequately justify the result reached: [49]-[51]. Because the reasons did not provide the basis for meaningful appellate review, a new trial was required: [52].