Court of Appeal
Supreme Court
Sydney

Decisions of Interest

10 October 2020 – 23 October 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

Defamation; Evidence: Royal Commission evidence

***Feldman v Nationwide News Pty Ltd* [2020] NSWCA 260**

Decision date: 20 October 2020

Bell P, Macfarlan JA, Payne JA

In 2015 Rabbi Yosef Feldman gave evidence during the Royal Commission into Institutional Responses to Child Sexual Abuse (RC). A principal focus of his cross examination was a reported complaint made by a child in 2002 against a rabbinical student at the Yeshiva Gedola in Bondi identified as AVL, where Rabbi Feldman had held the role of Rabbinical Administrator for about 15 years. In 2002 Rabbi Feldman had learned from his father, also a rabbi, that a complaint had been made that AVL had engaged in inappropriate behaviour with regard to children.

Reporting of Rabbi Feldman's evidence at the RC, of the submissions made to the RC and of the RC report itself gave rise to four sets of defamation proceedings brought by Rabbi Feldman against various media organisations and individual journalists. The respondents successfully raised "fair report" defences pursuant to s 29(1) of the *Defamation Act 2005* (NSW) in respect of each of the publications in relation to which defamatory imputations were either accepted or found to be conveyed. The primary judge dismissed each set of proceedings. Rabbi Feldman brought an appeal alleging i) apprehended bias on the part of the primary judge, ii) that his evidence at the RC was precluded by s 6DD of the *Royal Commissions Act 1902* (Cth) (RC Act), and iii) the reports were unfair as they mischaracterised his evidence. Section 6DD of the RC Act provides that statements made in the course of giving evidence or documents produced pursuant to a summons in relation to a RC are not admissible in evidence against a person in any civil or criminal proceedings.

Held: dismissing the appeal: [207].

- The possibility that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the relevant question is not to be assessed with the benefit of hindsight, but at the time of the events said to give rise to that possibility in the first place: [41]. The fact that the primary judge ultimately rejected Rabbi Feldman's case for a variety of reasons did not and could not have demonstrated actual or apprehended bias: [43].

- Section 6DD of the RC Act was contemplated as affording a measure of protection to witnesses against criminal or civil prosecution. It was intended to operate only where a witness in a Royal Commission was the subject of proceedings brought *against* him or her: [81], [84]. It did not preclude the transcript or video of Rabbi Feldman's evidence in the Royal Commission from being admitted and relied upon to support the fair report defence: [97].

- The primary judge did not err in allowing the defences of fair reporting, justification and fair summary.

Torts: elements of negligence, obvious risk

***Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2020] NSWCA 263**

Decision date: 23 October 2020

Basten JA, Payne JA, McCallum JA

In 2011, Emily Tapp, then 19 years old, participated in a campdraft event at Ellerston organised by the Australian Bushmen's Campdraft & Rodeo Association Ltd (the Association). She fell from her horse while competing and suffered a significant spinal injury. Ms Tapp commenced proceedings seeking damages for personal injury arising out of the accident. The parties agreed upon quantum in the amount of $6,750,000. The primary judge found that negligence had not been established and, in any event, the risk of falling from the horse was the manifestation of an obvious risk of a dangerous recreational activity within the meaning of the *Civil Liability Act 2005* (NSW) (CLA), and found in favour of the Association. Ms Tapp brought an appeal.

Held: by majority dismissing the appeal (McCallum JA dissenting): [127].

- What was required in taking reasonable care was for an informed decision to be made as to whether it was safe to continue with the competition: [54]. Ms Tapp did not establish that the Association breached its duty of care: [55]. She did not establish that the exercise of reasonable care in all the circumstances required the event to be stopped, for the arena surface to be ploughed prior to the event, or that the Association should have warned the appellant that the ground at the site of the campdrafting event had become unsafe: [56]-[58]. McCallum JA (dissenting): Ms Tapp's evidence that the surface of the arena had become unsafe for campdrafting was strong: [171]. The horse fell because the surface of the arena had deteriorated to the point where a horse proceeding at a canter struggled to find her stride so that her legs slipped from under her: [182].
- Ms Tapp formulated the relevant risk as being "the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the arena." Prior to Ms Tapp's fall, over 700 rides had taken place on the arena surface. The fact that, after such a day, the surface of the arena would have "deteriorated", heightening the risk of a horse slipping, would have been obvious to a reasonable person in the position of Ms Tapp. Assuming that it had been established that Ms Tapp's horse had fallen by reason of that deterioration, that would nevertheless have been a manifestation of an obvious risk of a dangerous recreational activity. McCallum JA (dissenting): the risk that materialised must be characterised with enough particularity to enable the court to determine whether it was foreseeable by the organisers, whether it was one capable of attracting liability and whether it would, prospectively, have been obvious to a reasonable person in the position of the plaintiff: [162]. The risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the arena was an apt description of the risk and would not have been obvious to a reasonable person in Ms Tapp's position: [166], [185].

Land Law: strata schemes

Cooper v The Owners – Strata Plan No 58068 **[2020] NSWCA 250**

Decision date: 12 October 2020

Basten JA, Macfarlan JA, Fagan J

Johanna and Leo Cooper own a lot in a freehold strata scheme constituted by a 43-storey apartment building in Darlinghurst. By-law 14 prohibited an owner or occupier of a lot from keeping an animal on a lot or on the common property. The Coopers kept a dog in their apartment in contravention of by-law 14. Upon an issue being raised as to the ongoing contravention of the by-law, the Coopers commenced proceedings in the NSW Civil and Administrative Tribunal (NCAT) seeking a declaration that the by-law was invalid. NCAT declared by-law 14 to be harsh, unconscionable and oppressive thereby contravening s 139(1) of the *Strata Schemes Management Act 2015* (NSW) (the Act). The owners corporation of the strata scheme appealed to an Appeal Panel of NCAT which upheld the appeal and set aside the orders. It also made orders requiring the Coopers to remove the dog within 28 days. The Coopers brought an appeal.

Held: granting leave to appeal and allowing the appeal: [74].

- The lot owner holds a freehold estate in a stratum; therefore the rights and obligations are those attaching to real property. The fundamental principle of indefeasibility of title under the Torrens system has significance in identifying the attributes of a particular title, including the constraints imposed by by-laws: [9].
- Section 139 of the Act focuses on the character of the particular by-law, rather than the state of knowledge of any particular lot owner: [45]. The phrase “harsh, unconscionable or oppressive” is better understood as a triune, three words conveying a single criterion, invoking the application of values: [26]. The power to make by-laws is not unconstrained. It is necessary to identify the purpose for which the power is conferred, as a conferral of power can only be exercised for the purpose for which it was created: [56]-[57].
- A by-law which restricts the lawful use of each lot, but on a basis which lacks a rational connection with the enjoyment of other lots and the common property, is beyond the power to make by-laws conferred by s 136: [61]. A by-law which restricts the rights of all owners where the prohibited use would not interfere with the use and enjoyment of any other lot is not a by-law which has regard to the interests of all lot holders; nor is it “for the benefit of the lot owners”: [63].
- The possible administrative convenience that might result from a blanket ban could not justify interference with the ordinary rights of lot owners. The making of evaluative judgments in response to individual lot owners is a common incident of the management of strata schemes: [82].
- By-law 14.1 was oppressive contrary to s 139(1) because it prohibited an aspect of the use of lots in the strata plan that is an ordinary incident of the ownership of real property and provided no material benefit to other occupiers of the building in their use or enjoyment of their own lots or the common property: [88].

Negligence: public authorities

***Coffs Harbour City Council v Polglase* [2020] NSWCA 265**

Decision date: 23 October 2020

Basten JA, Macfarlan JA, Leeming JA

The State of NSW restored the Coffs Harbour Jetty for use as a public walkway in 1997. The State advised the Coffs Harbour City Council that the jetty's railing complied with Australian building standards. There were railings on each side of the jetty with a gap of 395mm between the middle rail and the kerb, and a gap of 480mm between the top rail and the middle rail. A warning sign had been placed at the entrance to the jetty. The Council accepted responsibility for the jetty in 2002. There were a series of accidents and near accidents involving young children falling from the jetty, which had come to the knowledge of the Council.

In 2011, Tedmund Polglase, then aged five, was walking with his grandparents when he fell from the Jetty onto hard sand some 4 metres below, suffering serious injury. His grandparents were not holding his hand and had turned away from him immediately prior to his fall. Mr Polglase sued the Council as occupier, the State as a former occupier which had designed and constructed the railing, and the grandparents as they had taken their grandson into a place of danger and failed properly to look after him. There were six cross-claims for statutory contribution. The primary judge found the Council liable, but dismissed the plaintiff's claims against the State and the grandparents. The Council appealed, and Mr Polglase sought leave to cross-appeal from an order as to costs.

Held: granting leave, dismissing leave to cross-appeal and the appeal: [182].

- The Council was required to exercise reasonable care, not to achieve absolute safety: [106]. The relevant risk was that a young child might fall from the jetty. The Council knew that young children had fallen, or nearly fallen, and on one occasion with very serious consequences. It was no answer that the railing complied with Australian standards: [108]. A reasonable person in the position of the Council would have taken the step of installing additional strands of wire or a mesh infill to prevent that risk materialising: [110]. A reasonable person in the position of the grandparents would not necessarily have firmly held Mr Polglase's hand or ensured that it was impossible for him suddenly to approach and pass through the railing: [162].

- A risk warning per s 5M of the *Civil Liability Act 2002* (NSW) may be general, but it must be a warning of risks which include the particular risk concerned, and it must also warn of the general nature of the particular risk: [117]. The sign was directed to the risk of diving from the jetty into the water, and there was nothing alerting the reader to the risk of falling from the wharf onto hard sand: [119].

- The Council's control and management had been in place for nine years, and it had been actively involved in the restoration of the jetty before then in part on the basis that it would assume liability for it: [146]. The primary judge did not err in concluding that there was no breach of duty by the State: [149].

Australian Intermediate Appellate Decisions of Interest

Migration: particular social group

ADL17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs **[2020] FCAFC 178**

Decision date: 16 October 2020

White J, Bromwich J, Burley J

ADL17 is a national of Iran who arrived in Australia by boat as an unauthorised maritime arrival in 2013. He made a claim for protection on multiple bases including a fear of harm by reason of his parents' Zoroastrian beliefs, his own conversion to Christianity, his interest in freemasonry, his tattoos, his interest and activities associated with music and dance, and his status as a failed asylum seeker. All were rejected by the Immigration Assessment Authority as it was satisfied that he would not face a real chance of suffering harm in relation to these claims. His visa application was refused by a delegate of the Minister. That refusal was affirmed by the Authority in 2016 and his application for judicial review was unsuccessful. ADL17 brought an appeal against the dismissal of his application for judicial review.

Held: allowing the appeal: [62].

- The Authority did not ever make an express finding concerning the question of whether ADL17 was a member of a particular social group: [42]. As was noted in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2003) 216 CLR 473, in a case of the present kind, "defining the particular social group and the type of harm feared is fundamental in determining whether a member of that group has a well-founded fear of persecution": [43]. The assessment cannot be made of whether an applicant can take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country if the basis on which it is claimed that there is a well-founded fear of such persecution has not been identified: [44].

- Until the Authority had made a finding as to the precise nature of the characteristic concerning ADL17's interest in music and dance, it did not have a sound basis on which to make the assessment of whether confining his music and dance activities to private functions undertaken "underground" and with "caution" conflicted with a fundamental characteristic of ADL17's identity. It could not assess the significance of ADL17 having to carry out his activities in this manner. This indicated that the Authority did not discharge its statutory task. Because it did not make findings concerning the particular social group to which ADL17 could belong which was said to be the basis for his claimed well-founded fear of persecution, it could not assess whether the steps it considered ADL17 could take to modify his behaviour may avoid a real chance of persecution for that reason. It was not open to the Authority to find that ADL17 could avoid a real chance of persecution by the modifying actions it identified: [52]-[54].

Asia Pacific Decision of Interest

Procedure: abuse of process

***Smith v R* [2020] NZCA 499**

Decision date: 16 October 2020

Kós P, French J, Collins J

Phillip Smith was convicted of multiple offences in 1996 and was sentenced to life imprisonment. Mr Smith was incarcerated at Spring Hill Correctional Facility and was included in a reintegration programme for prisoners close to being released on parole. In 2013 he obtained a passport by false pretences, and in 2014 he escaped from lawful custody while on short-term release, flying to Rio de Janeiro. When he did not return to Spring Hill as required, an Interpol Red Alert Notice was sent to Interpol Brazil requesting his provisional arrest for the purposes of extradition. Mr Smith was quickly apprehended by Brazilian authorities and deported. He faced trial in New Zealand for those further offences. Mr Smith requested that the primary judge direct the jury to return a guilty verdict. Mr Smith was convicted and sentenced to a further 33 months' imprisonment. Mr Smith brought an appeal against conviction, arguing that the deportation by Brazil was unlawful, knowingly connived in by the New Zealand police, and that in consequence the prosecution was an abuse of process.

Held: dismissing the appeal against conviction: [98].

- Mr Smith faced the prospect of being eligible for parole on the 1995 offending, but remaining incarcerated for his 2013 and 2014 offending due to the delay in prosecution for the offences, the sentence taking effect only on conviction: [30].
- A defendant cannot invite conviction at the trial he asserts is an abuse of process, and then advance an appeal against the invited convictions on the basis of the alleged abuse. This wrongly thrusts the role of first instance decision-maker upon the appellate court. The issue of abuse of process should be dealt with before trial in the trial court: [36].
- A "Category 2" stay based on state misconduct can be ordered where there has been an abuse of process "which amounts to an afront to the public conscience". The hallmark is unlawful conduct by New Zealand authorities in a foreign jurisdiction or want of good faith or a proper motive in subverting the defendant's rights in that jurisdiction. It is not sufficient simply for the deportation to be unlawful according to the laws of the deporting state: [55].
- The New Zealand authorities did not procure the deportation ordered by the Brazilian Federal Criminal Court nor did they ensure his final destination was New Zealand, which was the direct consequence of the deportation order: [84].
- Mr Smith did not establish misconduct sufficient to take the exceptional step of precluding his conviction on the basis of abuse of process. His return and his convictions for escaping lawful custody and obtaining a passport by false pretences were not an affront to the public conscience: [97].

International Decisions of Interest

Constitutional Law: right to equality

Fraser v. Canada (Attorney General) **2020 SCC 28**

Decision date: 16 October 2020

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

Three female retired members of the Royal Canadian Mounted Police (RCMP) took maternity leave in the early-to-mid 1990s. Upon returning to full-time service, they experienced difficulties combining their work obligations with their childcare responsibilities. At the time, the RCMP did not permit regular members to work part-time. In 1997, the RCMP introduced a job-sharing program, which the members joined, in which they could split the duties and responsibilities of one full-time position. Most of those who enrolled in the job-sharing program were women with children. RCMP members can treat certain gaps in full-time service, such as leave without pay, as fully pensionable. The claimants expected that job-sharing would be eligible for full pension credits. However, they were later informed that they would not be able to purchase full-time pension credit for their job-sharing service.

The claimants initiated an application arguing that the pension consequences of job-sharing have a discriminatory impact on women contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Their claim failed in the Federal Court. The Federal Court of Appeal dismissed the claimants' appeal.

Held: by majority allowing the appeal (Côté, Brown and Rowe JJ dissenting): [24].

- Full-time RCMP members who job-share must sacrifice pension benefits because of a temporary reduction in working hours. This arrangement has a disproportionate impact on women and perpetuates their historical disadvantage. It is a clear violation of their right to equality under s. 15(1) of the Charter: [5].
- Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground: [30].
- To prove discrimination under s. 15(1), claimants must show that a law or policy creates a distinction based on a protected ground, and that the law perpetuates, reinforces or exacerbates disadvantage. What is needed in adverse effects cases is a clear account of how to identify adverse effects discrimination, because the impugned law will not, on its face, include any distinctions based on prohibited grounds: [50].

Discrimination: social housing; proportionality analysis

R (on the application of Z and another) (Appellants) v Hackney London Borough Council and another (Respondents) **[2020] UKSC 40**

Decision date: 16 October 2020

President Lord Reed, Lord Kerr, Lady Arden, Lord Kitchin, Lord Sales

Agudas Israel Housing Association Ltd (AIHA) is a charity whose objective is to make social housing available primarily for members of the Orthodox Jewish community. AIHA makes properties available to the Hackney London Borough Council to house persons who have applied and have a priority need for social housing. The Council only nominates members of the Orthodox Jewish community to be housed in property owned by AIHA. R was a single mother with four small children, two of whom had autism. She was on the Council's list for social housing and had been identified by the Council as having priority need for a larger property. She is not from the Orthodox Jewish community and so had been unable to gain access to the properties let by AIHA. She had had to wait longer than families from the Orthodox Jewish community to be allocated a suitable property by the Council. R commenced proceedings against the Council and AIHA complaining that this was unlawful direct discrimination on the grounds of her religion and race. The Divisional Court dismissed the proceedings. R brought an appeal to the Court of Appeal, which was unsuccessful. R brought an appeal to the Supreme Court.

Held: dismissing the appeal: [88], [117].

- Proportionality analysis requires identification of a legitimate aim and then an assessment of whether a measure taken to promote that aim is proportionate in its effects in pursuing it, having regard to other interests at stake: [65]. The question to determine was whether AIHA's allocation policy was a measure which was proportionate to promoting such aims in relation to ameliorating the position of members of the Orthodox Jewish community: [66].

- The Divisional Court directed itself correctly as to the proportionality test to be applied. It made appropriate findings on the evidence before it regarding the needs of the Orthodox Jewish community connected to their religion and the disadvantages to which they were subject on grounds of their religion: [73]. The courts below were entitled to weigh the benefits for that community as compared with the disadvantages experienced by other groups as a result, rather than by comparing the benefits for that community with the disadvantage suffered by one person drawn from those other groups falling outside the policy: [79].

- AIHA's allocation policy operated as a direct counter to discrimination suffered by the Orthodox Jewish community in seeking to obtain housing: [76]. It was not an illegitimate "blanket policy" as there was some flexibility to allocate properties to non-members of the Orthodox Jewish community if AIHA has properties surplus to the demand from that community: [77]. It was proportionate for AIHA to adopt an allocation policy which aimed to meet the particular needs and alleviate the disadvantages experienced by members of the Orthodox Jewish community in connection with their religion: [79].