Decisions of interest

8 October – 19 October 2018

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

Contents

New South Wales Court of Appeal decisions of interest

1. **Torts: false imprisonment and wrongful arrest; statutory interpretation**

   Robinson v State of New South Wales **[2018] NSWCA 231**

   Decision date: 16 October 2018

   McColl JA; Basten JA; Emmett AJA

   At 5 pm on 22 December 2013, the appellant attended a Sydney police station in response to attempts by police to contact him. He was immediately arrested, without warrant, for breach of an apprehended violence order. The appellant was offered, and accepted, the opportunity to participate in a record of interview. He was released without charge at 6.18pm, following the conclusion of the interview. The appellant commenced proceedings claiming damages for wrongful arrest and false imprisonment. The primary judge dismissed the appellant's claim. He accepted the arresting officer's evidence that a decision whether to charge the appellant depended on what he said in the interview and that, at the time of the arrest, he had not decided to charge him. On appeal, the key issue was whether the arrest of the appellant was lawful under *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (**LEPRA**), s 99, in circumstances where there was no positive intent to lay charges at the time of arrest. Under s 99(1), a police officer may arrest a person, without warrant, if they believe on reasonable grounds that the person has is committing or has committed an offence, and if they are satisfied that the arrest is "*reasonably necessary*" for one or more of the reasons set out in s 99(1)(b). These reasons include "*to ensure that the person appears before a court in relation to the offence*", or "*because of the nature and seriousness of the offence*". Under s 99(3), the police officer must, as soon as reasonably practicable, take the person before a justice to be dealt with, although they may also discontinue an arrest at any time.

   Held:

- The majority allowed the appeal, finding the arrest unlawful (Emmett AJA dissenting). LEPRA s 99 must be construed in its context, including general law principles concerning the scope and purpose of arrest: [34]-[35]; [132].

- In legal terminology, "*arrest*" is generally used to identify that deprivation of liberty which is a precursor to the commencement of criminal proceedings against the person arrested, justified as necessary for the enforcement of the criminal law. The power to arrest existed, and must be exercised, for the purpose of bringing the person arrested before a justice as soon as reasonably practicable: [46]; [95]; [136]; [154].

- Neither the text nor context of the statute suggested an intention to depart from these general law constraints: [120]; [124]-[127]; [165]-[167]; [173]. Rather, they were embedded in the language of s 99, and expressly preserved by LEPRA, s 4: [35]; [44]; [132]-[134]. As no decision whether to charge the appellant had been made at the time of arrest, the arrest was not for the purpose of commencing the criminal process; accordingly, it was unlawful: [128]-[129]; [194].

2. **Trusts: compensation scheme for victims of asbestos-related diseases**

Talifero v Asbestos Injuries Compensation Fund Limited as Trustee for the Asbestos Injuries Compensation Fund **[2018] NSWCA 227**

Decision date: 11 October 2018

Beazley P; Sackville AJA; Emmett AJA

Mr Talifero brought negligence proceedings against Amaca Pty Ltd in the Dust Diseases Tribunal after contracting mesothelioma through exposure to James Hardie asbestos products (**Talifero Proceeding**). He died of mesothelioma in October 2017. In December, his Estate was awarded $560,482 in damages. Although Mr Talifero was also exposed to asbestos during his employment overseas, the Tribunal held that this exposure was irrelevant as mesothelioma was an "*indivisible*" disease. In January 2018, the respondent applied for judicial advice under the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW) (**the Act**), s 55(1), seeking an order that it would be "*justified in not paying so much of the damages award made in the Talifero Proceedings as reflects the extent to which Mr Talifero's exposure to asbestos or asbestos products occurred outside Australia*". The Executor of Mr Talifero's estate (**the appellant**) was not joined as a party. The primary judge made the order in the terms sought. His decision depended on the construction of three inter-related instruments that comprised a scheme to compensate victims of asbestos-related diseases: the Act, the Asbestos Injuries Compensation Fund Amended and Restated Deed (**Trust Deed**) and the Amended and Restated Final Funding Agreement (**FFA**). The issue on appeal was whether the primary judge erred in failing to find that the whole of the claim made in the Talifero Proceeding was a "*Proven Claim*" that the respondent was obliged to pay under the FFA, and thus erred in giving the order as sought.

Held:

- The Court granted the appellant leave to appeal as a non-party, and allowed the appeal. A claim was a "*payable liability*" as defined in the Act insofar as it was founded asbestos exposure in Australia. Mr Talifero's "*claim*" was that propounded in the Talifero Proceeding, which was wholly founded on exposure in Australia. The Act thus authorised the respondent to pay the whole award: [105]-[113].

- The better construction of Proviso (B) to the definition of "*Personal Asbestos Claim*" in the FFA (to which the definition of "*Proven Claim*" referred) was that each element referred to the claimant's exposure to asbestos alleged in the claim and not to the claimant's actual exposure to asbestos: [123]-[124]. As Mr Talifero's claim was for damages arising solely from exposure to asbestos in Australia, it satisfied the definition of "*Proven Claim*", notwithstanding his actual exposure to asbestos overseas. The respondent was thus obligated to pay the whole award: [121]-[127].

- Emmett AJA considered that, on proper construction of the instruments, whether Mr Talifero was entitled to the full amount of the award, or nil, depended on whether he had inhaled the fibre that caused his mesothelioma in Australia: [164]-[165]; [167].

Other Australian intermediate appellate decisions of interest

3. **Administrative law: mandatory considerations; migration and citizenship**

Minister for Immigration and Border Protection v Egan **[2018] FCAFC 169**

Decision date: 9 October 2018

Allsop CJ; Perram J; Jagot J

The respondent, an Irish citizen and Catholic priest, was conferred Australian citizenship in 1993. In 2013, he was sentenced to a term of imprisonment for historical child sex offences. In 2016, the Minister exercised his discretion to revoke the respondent's citizenship. Under the *Australian Citizenship Act 2007* (Cth) (**the Act**), s 34(2), citizenship by conferral may be revoked if a person has been convicted of a "*serious offence*", and the Minister is "*satisfied it would be contrary to the public interest*" for the person to remain a citizen. The respondent applied for merits review of the Minister's decision in the Administrative Appeals Tribunal. The Tribunal found it would not be contrary to the public interest for the respondent to retain citizenship; such that no revocation power arose. The Tribunal considered that the respondent would be supervised if he remained in Australia, reducing the risk of re-offending, but this would not occur in Ireland. The Minister appealed to the Full Court of the Federal Court on a question of law. He argued that the Tribunal had failed to consider three mandatory considerations: that the respondent would have been granted an ex-citizen visa under the *Migration Act 1958* (Cth), s 35(5), the moment his citizenship was cancelled; he would not be deported until some ultimate decision were made under the *Migration Act*; and it was only then that deportation issues were relevant.

Held:

- The Court allowed the appeal, remitting the matter to the Tribunal: [32]; [34]. The consequence if the respondent's citizenship were revoked was not, as the Tribunal assumed, that he would immediately be repatriated to Ireland. Rather, he would be taken to have been granted an ex-citizen visa; he would then face the possibility that the Minister might exercise the power to cancel that visa on character grounds under the *Migration Act*, ss 501(2) or (3), or automatic cancellation under s 501(3A). It was not legally necessary that s 501 be engaged, or that it would result in removal: [16].

- It was implied from the subject matter, scope and purpose of the *Citizenship Act* that the direct consequence of the grant of an ex-citizen visa under the *Migration Act*, s 35 must be taken into account in being satisfied whether it would be contrary to the public interest for a person to remain an Australian citizen under s 34(2)(c). The Tribunal thus failed to take into account a mandatory relevant consideration: [21].

- It was not necessary to determine whether the visa cancellation machinery of the *Migration Act*, s 501, and the attendant risk of repatriation, was also a mandatory consideration: [22]. The Court rejected a submission that the Tribunal's reasons should be understood as involving consideration of the issues which arose under ss 35(5) and 501 as part of the reasoning process: [23]-[24].

4. **Criminal law: victims' compensation; statutory interpretation, 'violence'**

Attorney-General (Tas) v CL **[2018] TASFC 6**

Decision date: 15 October 2018

Blow CJ, Wood J; Porter AJ

The respondent's ex-husband breached family violence orders on several occasions, culminating in a suspended term of imprisonment. The respondent thereafter made an application for victims' compensation, based on allegations of stalking contrary to the *Criminal Code* (Tas), s 192, and various forms of family violence within the meaning of the *Family Violence Act 2004* (Tas) (**FVA**), namely, economic abuse, emotional abuse, and breaches of family violence orders. Under the *Victims of Crime Assistance Act 1976* (Tas) (**the Act**), compensation may be awarded where a person is killed or has suffered injury "*as a result of an act of another person that constitutes an offence*". Offence is defined in s 2(1) as "*an offence that involves violence by one person against another*", and expressly includes crimes under certain provisions of the *Criminal Code*, including s 192. A Criminal Injuries Commissioner held that the definition of "*offence involv*[*ing*] *violence*" applied only to physical violence. On judicial review, the primary judge held that an offence which involved injury by way of coercion and intimidation, emotional abuse or economic abuse fell within the definition of offence. The Attorney-General appealed to the Full Court of the Tasmanian Supreme Court. The issue for the Court was whether "*violence*" meant only physical violence or the threat thereof, or whether it encompassed such things as economic abuse or emotional abuse and intimidation, each being offences under the FVA.

Held:

- The Court allowed the appeal. Whatever the social and moral desirability of the respondent's construction, a fair reading of the Act did not allow an interpretation of the definition to include extended notions of domestic or family violence, let alone an even wider definition as might flow from the primary judge's approach: [83].

- The primary judge erred in two specific respects in his approach to construction. First, the judge erred in applying the presumption that remedial legislation should be construed beneficially. He ought to have looked at what meanings the phrase "*offence involv*[*ing*] *violence*" could tolerably bear by application to standard principles, before giving the provision a liberal construction based on the beneficial nature of the legislation: [39]. The judge also erred in his application of the 'always speaking' principle. Putting the definition in its proper context did not compel the adoption of a contemporary meaning extending beyond physical violence: [48]-[50].

- The words "*offence involv*[*ing*] *violence by one person against another*", in context, held the more common meaning of physical force or the threat thereof. The inclusion of specific *Criminal Code* sections in the definition expanded on this narrower meaning. One would expect specific reference to such offences as those in the FVA if the intention were for these to fall within the definition. The extrinsic Parliamentary materials also supported this less expansive construction: [73]; [82]; [84].

Asia Pacific decisions of interest

5. **Judgments: reasons for decision; tort: civil malicious prosecution**

***Coconut Products Ltd v Markham Farming Co Ltd* [2018] PGSC 60**

Decision date: 10 October 2018

Gavara-Nanu J; Makail J; Dingake J

The appellant had entered into a lease agreement with a proprietor, and had discussed various options to renew the lease or purchase the property. The respondent purported to purchase the property. The appellant disputed the sale and instituted various proceedings. The proceedings were determined and judgment entered in favour of the respondent with costs. The respondent then instituted proceedings against the appellant in the National Court, claiming damages purported to accrue from the previous proceedings. The primary judge entered judgment in favour of the respondent, and awarded damages for loss of business and other losses. In delivering his decision, he gave a brief summary and the orders. He indicated that he would publish his detailed reasons for decision; however, none were received by the parties. The issues on appeal to the Supreme Court of Papua New Guinea focused on whether the primary judge had erred in law in failing to provide reasons for his decision, and whether a cause of action could arise out of proceedings dismissed for being frivolous, vexatious, or an abuse of process. If such a cause of action were recognised, further questions arose as to whether the National Court action on this basis was barred by virtue of *res judicata* and issue estoppel; if not, whether the prior proceedings had been dismissed as being frivolous, vexatious, or an abuse of process, and if so, whether the respondent had proved its losses.

Held:

- The Court allowed the appeal in part and set aside the decision below: [80]. The primary judge had given oral reasons for his decision, as evident from the transcript, at the time of delivering the decision, albeit not published. These were sufficiently comprehensive and enabled the appellant to prepare the appeal. There had thus been no error of law and no breach of natural justice established: [31]-[32].

- By reference to English and Australian decisions recognising the tort of malicious prosecution of civil proceedings or abuse of process, the Court considered that this form of tort should be part of Papua New Guinean laws. The respondent could thus initiate proceedings on this basis: [58]-[60]. The appellant's reliance on the doctrines of *res judicata* and issue estoppel to preclude this was misconceived: [62]-[64].

- Although the tort of civil malicious prosecution was actionable, the evidence did not support the finding by the primary judge that the initiating of prior proceedings was done with malice and without reasonable and proper cause. The appellant therefore could not be liable in damages: [76]-[79].

6. **Defamation: against public officials; recklessness**

Ngiraingas v Shmull **[2018] PWSC 19**

Decision date: 17 October 2018

Rechucher J; Maraman J; Bennardo J

The appellant, a former government official in Peleliu (a state of Palau), made a number of statements about the current governor of Peleliu (**the respondent**, appellee in the judgment). The statements, contained in a number of letters, alleged that the respondent had engaged in self-dealing, nepotism, and misconduct in public office. The allegations were allegedly based on conversations the appellant had with third parties about the respondent. The respondent commenced proceedings in defamation. The trial division found that the statements were false and defamatory and that the appellant knew the statements were false or had made them with reckless disregard as to the truth. Punitive damages were awarded, on the basis that the appellant had shown reckless disregard by exaggerating information received from third parties, without verification. The appellant appealed.

Held:

- The Supreme Court of Palau dismissed the appeal. Whether an allegedly defamatory statement is true or not is a question of fact, reviewable for clear error. Whether the evidence is sufficient to support a finding of actual malice or reckless disregard is a question of law, reviewed *de novo*: [10].

- As Palau had no civil statute concerning tortious defamation, the Court turned to United States Restatements of Law for guidance, pursuant to Palauan law. Because the respondent was a public official, the requisite culpability for defamation was above that of mere negligence. The publisher would be liable only if he knew that the statement was false or was reckless in publishing those statements: [11]-[12].

- On the whole, the witnesses at trial testified that they did not provide the appellant with the information he used to accuse the respondent. The trial division chose to credit the respondent's witnesses over the appellant's; there was no clear error demonstrated in the determination that the statements were defamatory: [19].

- On review of the evidence it was clear that the appellant had acted recklessly. He had acted with wilful ignorance, when faced with a high degree of awareness of the probable falseness of his statements, and maintained his statements in spite of explicit protests from the respondent: [23].

- The Court rejected the appellant's argument that his statements were about matters of public concern, such that his communications should be protected in furtherance of free speech. The appellant received due protection in the elevation of the standard from negligence to recklessness or knowledge; there was no separate absolute privilege to defame others regarding matters of public concern: [26]-[27].

Other international decisions of interest

7. **Courts: judges; administrative law: apparent bias**

Stubbs v The Queen (Bahamas) **[2018] UKPC 30**

Decision date: 18 October 2018

Lady Hale; Lord Wilson; Lord Sumption; Lord Hughes; Lord Lloyd-Jones

In 2013, after a jury trial before Jones J, the three appellants were convicted on counts of murder and attempted murder, and sentenced. This was their third trial. The first was in 2002, before Allen J and a jury, but the convictions were overturned on appeal. A re-trial took place before Isaacs J and a jury in 2007, but was aborted on the first day of the summing up. Isaacs J and Jones J made rulings in their respective trials including in relation to dock identification and the admissibility of evidence given in the first trial by a now deceased witness. When the Court of Appeal convened to hear the appeals on conviction and sentence, the appellants objected to Isaacs JA's sitting on the appeal. After a separate hearing, the Court found that the reasonable, fair-minded and informed observer, in the circumstances, would not apprehend any possible bias warranting recusal. The Court (Conteh, Isaacs and Crane-Scott JJA) heard the appeals, dismissing them on 8 July 2016. The appellants were given leave to appeal to the Privy Council, including on the question of apparent bias.

Held:

- The Board allowed the appeal, remitting the matter to the Court of Appeal for the appeals to be reheard: [35]. The decisions of Isaacs J during the trial would have led a fair-minded and informed observer to conclude that there was a real possibility he had pre-judged issues which fell for consideration by the Court of Appeal: [34].

- During the second trial, Isaacs J had made concluded rulings on intermediate issues of major significance. On the appeal, he was required to address essentially the same issues upon which he had ruled in the second trial. The prosecution evidence was in substance the same in both the second and third trials: [25]-[28].

- This was not analogous to a judge hearing the same case with a new jury on a re-trial. In that situation, if a previous ruling against a defendant is repeated on re-trial, they are not in a worse position, and could appeal the ruling to an independent and impartial appellate court. Different considerations apply when occasions for further rulings do not arise in the same proceedings, but in a separate appeal: [23]; [31].

- The passage of time would have done little to diminish legitimate concerns of bias, in such a notorious and memorable case. It did not matter that Isaacs JA was not sitting alone on appeal; the mutual influence of each member of the Court over the others meant if any were impugned, the whole decision was liable to be set aside: [32]-[33].

High Court Cases considered:

Livesey v The New South Wales Bar Association (1983) 151 CLR 288

8. **Discrimination: sexual orientation; rights to freedom of religion and expression**

Lee v Ashers Baking Company Ltd & Ors (Northern Ireland) **[2018] UKSC 49**

Decision date: 10 October 2018

Lady Hale; Lord Mance; Lord Kerr; Lord Hodge; Lady Black

Mr Lee, a gay man, ordered a cake from the McArthurs' bakery (**Ashers**), to feature the slogan 'Support Gay Marriage'. The McArthurs told Mr Lee they could not fulfil the order on religious grounds. Mr Lee brought a claim alleging discrimination on the grounds of sexual orientation, per the *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* (**SORs**), and/or on the religious belief or political opinion, per the *Fair Employment and Treatment (Northern Ireland) Order 1998* (**FETO**). The primary judge found direct discrimination on all three grounds, and that it was not necessary to read down the legislation to make it compatible with the McArthurs' rights to freedom of religion and expression under the European Convention on Human Rights. The appellants appealed by way of case stated to the Northern Ireland Court of Appeal. The Attorney General (**AG**), who was joined as a party, challenged the validity of the prohibitions under the SORs and the FETO, insofar as they imposed a civil liability on a person who refused to express a view on a public policy matter contrary to their religious beliefs. The Court dismissed the appeal, finding direct discrimination on the basis of sexual orientation, and that it was not necessary to read down the SORs. The AG gave notice to the Court requiring it to make a reference to the Supreme Court, however, the Court concluded it had no power to do. The AG made references to the Supreme Court. The appellants also sought to appeal.

Held:

- The Supreme Court held that it had jurisdiction to hear an appeal against all aspects of the Court of Appeal judgment, and deal with the AG's references: [66]-[70; [88]-[90]. It granted the appellants permission to appeal and allowed their appeal.

- The primary judge found that the appellants refused the order due to the message on the cake, not on account of Mr Lee's actual or perceived sexual orientation. The message was not indissociable from sexual orientation. Support for same-sex marriage was not a proxy for any particular sexual orientation; and its benefits did accrue only to gay and bisexual people: [21]-[35]. There being no relevant discrimination, it was unnecessary to consider if the SORs should be read down: [36].

- Discrimination must be based on the beliefs of someone other than the alleged discriminator; thus there could be no discrimination on religious grounds: [43]-[45]. However, the cake's message was arguably indissociable from Mr Lee's political opinion, thus there was *prima facie* discrimination on grounds of political opinion: [48].

- The appellants could not refuse to provide a cake because Mr Lee was a gay man or because he supported same-sex marriage; but no justification was provided for giving effect to the FETO to oblige the appellants to supply a cake with a message with which they profoundly disagreed, contrary to their Convention rights: [53]-[56].