Decisions of interest

9 April 2018 – 20 April 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.

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New South Wales Court of Appeal decisions of interest

1. **Torts: misfeasance in public office**

   Obeid v Lockley **[2018] NSWCA 71**

   Decision date: 12 April 2018

   Bathurst CJ; Beazley P; Leeming JA

   Mr Lockley and Mr Grainger (**the respondents**) were staff members of the Independent Commission Against Corruption (**ICAC**), appointed under the ICAC Act, s 104(1). They were involved in Operation Jasper, which was investigating the circumstances surrounding the decision of a NSW Government Minister to grant a coal exploration licence. Part of the investigation examined the activities of Locaway Pty Ltd, a company associated with the Obeid family. The appellants were members of the Obeid family. The respondents participated in the execution of a search warrant of premises occupied by Locaway. The execution of the warrant was recorded on video, and contents of certain documents, including a 'Heads of Agreement', were recorded on video, rather than being seized. Over a year later, during a public inquiry, senior counsel assisting ICAC presented Mr Moses Obeid with the Agreement and cross-examined him on it. He also tendered a redacted version. ICAC ordered that the unredacted version be supressed. An article was published in a major newspaper the next day regarding the Agreement and the cross-examination.

   The appellants brought claims against the respondents for the tort of misfeasance in public office, alleging that they had suffered harm by reason of the publication of the article based only upon the redacted Agreement. The key issues on appeal were whether the respondents were 'public officers' for the purpose of the tort, whether they were aware of or recklessly indifferent to or could reasonably have foreseen a risk of harm to the appellants, and whether their conduct caused damage.

   Held:

   - The respondents were 'public officers', being designated as senior investigators with ascribed powers and responsibilities under the ICAC Act. They were exercising the functions of a public officer in the execution of the search warrant: [115]-[119]; [206]; [212].

   - The appellants should not be permitted to raise a new case on appeal. On the basis put at trial, the primary judge did not err in his conclusions: [151]-[152]; [213]. Even if a new case were permitted, the appellants had failed to establish that the respondents were aware of or recklessly indifferent to the fact that the appellants were likely to suffer reputational harm, or that their conduct was causative of the harm [153]; [173]-[174]. It was not sufficient to establish that the likelihood of harm was reasonably foreseeable: [153].

2. **Negligence: Civil Liability Act 2002 (NSW) s 5O(2)**

South Western Sydney Local Health District v Gould **[2018] NSWCA 69**

Decision date: 13 April 2018

Basten JA; Meagher JA; Leeming JA

Robert Gould, by his tutor Peter Gould (**the Respondent**) presented to hospital with an open fracture to his left thumb. He was treated with two particular types of antibiotics that evening, and underwent surgery the following day. After being discharged, gangrene developed in his thumb, leading to its amputation.

The primary judge held that there had been a failure to administer another type of antibiotic on the relevant evening, known as 'gentamicin', being a breach of duty which was causative of the injury. He also rejected expert opinion that not administering gentamicin was *"competent professional practice"*. Under the *Civil Liability Act 2002* (NSW), s 5O(1) (**the Act**), a professional will not be liable in negligence if it is established that they acted in a manner which was *"widely accepted in Australia by peer professional opinion as competent professional practice"*, unless the court considers under s 5O(2) that the opinion is *"irrational"*. Certain opinions were rejected on the basis that they were based on inadequate reasoning, or did not consider the specific antibiotic needs of the patient.

The issues on appeal were whether the primary judge was correct in finding that the body of opinion was *"irrational"*, and whether he had erred in the approach adopted to determine the standard of care.

Held:

- The Court allowed the appeal. It was clear from examining the text, context and purpose of s 5O that it would be *"seriously pejorative and exceptional"* to find a professional's opinion to be irrational, and even more so if the opinion were widely held. Considering a body of opinion to be *"irrational"* is a stronger conclusion than merely disagreeing with it, or preferring a competing body of peer professional opinion: [96]. To the extent that the judge's approach amounted merely to preferring the views of one expert over another, it was inconsistent with ss 5O(3) and (4): [97].

- Despite the dispute between various experts, the appellant had established there was a practice, under s 5O(1), to administer the antibiotics which were in fact administered, and no more, unless there was significant exposure to water. To the extent that one of the experts failed to articulate the reasoning process leading to his conclusions, it did not follow that his opinion was irrational. Rather, it would have been open for the plaintiff to object to its tender in accordance with principles of admissibility of evidence: [101]-[102].

- The primary judge had erred in failing to determine the standard of care by reference to the evidence of what was regarded by peer professional opinion as competent professional practice: [123]-[124]; [128]-[129].

Other Australian intermediate appellate decisions of interest

3. **Workers' compensation: whether employment causative of injury**

***The State of South Australia v Roberts* [2018] SASCFC 25**

Decision date: 17 April 2018

Kourakis CJ; Blue J; Parker J

Ms Roberts was employed as full-time lecturer by TAFE South Australia. Whilst staying in accommodation provided by her employer for a remote teaching placement, she was bitten by mosquitos. The accommodation was in a deficient state, with broken flyscreens. Within a few days, she was suffering from a high fever, diarrhoea, painful joints and vomiting, and she was subsequently diagnosed with either reactive arthritis or inflammatory polyarthritis. Prior to the teaching placement, she had been in good physical and mental health.

Ms Roberts made a workers compensation claim under the *Return to Work Act 2014* (SA) (**the Act**). Under s 7(2), a claim must relate to an injury which (i) *"arises out of or in the course of employment"* where (ii) *"the employment was a significant contributing cause of the injury"*. The South Australian Employment Tribunal (**the Tribunal**) found in favour of Ms Roberts in relation to her arthritis and psychiatric sequelae claims, and an appeal to the Full Bench of the Tribunal was dismissed. The question of law to be determined by the South Australian Supreme Court was whether the Full Bench had erred in finding Ms Roberts' employment was *"a significant contributing cause"* of her injury.

Held:

- The Court dismissed the appeal, holding that the Full Bench was correct in its application of the statute. Limb (i) was satisfied, as Ms Roberts was in a geographical location for the purpose of her work, and sustained an injury related to that location. This was a test of association, not causation: [72].

- In relation to limb (ii), the issue of causation must be decided by reference to the statutory text construed and applied in a manner which best effects its statutory purpose: [96]. Care should be taken in referring to cases from other appellate courts, given differences in statutory wording and context: [80].

- The word *"significant"* engenders an evaluative judgement as to whether there is a sufficiency of connection between the worker's employment and the injury: [106]. It need not be the only or most significant cause, and there is no requirement that the employment of the worker exposed them to a greater risk of injury: [104]-[105]. The "but for" test cannot be the sole determinate of causation, but can be applied as part of the reasoning process: [107].

4. **Corporations: administration, equitable lien**

White, in the matter of Mossgreen Pty Ltd (Administrators Appointed) v Robertson **[2018] FCAFC 63**

Decision date: 19 April 2018

Allsop CJ; Banks-Smith J; Colvin J

On 21 December 2017, administrators were appointed to the auction house Mossgreen. At that time, Mossgreen operated an auction house and gallery business in multiple locations, and utilised the services of Grace Fine Arts for the storage of some goods consigned to it for auction. The inventory for the auction business was provided on a consignment basis. It was not in dispute that Mossgreen had no title or interest in the goods other than as a bailee.

In March 2018, the administrators sought directions under s 90-15 of the *Insolvency Practice Schedule* in the *Corporations Act 2001* (Cth), Sch 2. The administrators sought approval of their process for returning goods. Specifically, the administrators told owners that their goods would be returned on payment of a $353.20 levy per lot. They claimed entitlement to an equitable lien for expenses incurred in the identification, preservation and distribution of the consigned items, representing over a million dollars in expenditure. In effect, some consignors would have the total value of their property destroyed by the lien. The primary judge dismissed the substantive directions claim.

Held:

- The Court dismissed the appeal. It was within the statutory functions of the administrators to continue to perform the function of holding the consigned items, and as part of doing so, take steps to manage and return the items. These were functions which Mossgreen would have been expected to perform if the company were not under administration: [21]. In certain circumstances, a lien could arise in favour of administrators for costs incurred dealing with claims for the return of items, even where there was no ownership claim by the company under administration: [23]; [82]-[86].

- For three reasons, there was no basis for an equitable lien of the kind sought here: [24]. First, many of the incurred costs related to items which the administrators understood had been abandoned and were of little value. The stocktake costs could not be referrable to the smaller class of persons who could readily demonstrate their claim without the need for a stocktake, utilising the expertise of Mossgreen's staff. Even if a stocktake were needed, this arose from a breach of Mossgreen's obligations as bailee, being the failure to maintain an adequate inventory system for consigned items. Finally, much of the costs had been incurred for the benefit of the general body of creditors, including in relation to the sale of a part of Mossgreen's business relating to stamps and coins. The owners of the consigned items had no interest in this, as they would not benefit from such a sale: [26]-[29].

Asia Pacific decisions of interest

5. Defamation: qualified privilege, malice

Jonathan Lu and Others v Paul Chan Mo-Po and Another **[2018] HKCFA 11**

Decision date: 10 April 2018

Ma CJ; Tang PJ; Fok PJ; Chan NPJ; Reed NPJ

The first and second plaintiffs were, at the relevant time, pupils at a school in Hong Kong (**the plaintiff pupils**), and their father, the third plaintiff, was a member of the school's board of governors. The defendants were the parents of another pupil. Rumours circulated that the plaintiff pupils had cheated in exams, and a number of conversations and meetings took place between various parents and the school. The school concluded that there was no basis for taking disciplinary action. The plaintiffs sued for defamation arising from the publication of five emails and a summary prepared for a meeting. The defendants admitted that they had published the materials but denied that they were defamatory. In the alternative, they relied on qualified privilege. The plaintiffs pleaded malice.

At trial, a jury found that all six communications had been defamatory, and four had been published maliciously. Damages were awarded. For the two other communications, the jury made certain factual findings, enabling the primary judge to later find that they were published on privileged occasions. The Court of held that the judge had misdirected the jury on the issue of malice. It set aside those verdicts and entered judgment for the defendants. The plaintiffs appealed.

Held:

- The Court allowed the appeal and ordered a retrial on the issue of malice. The judge's directions to the jury were defective. The jury were asked to return special verdicts on disputed questions of fact at the same time as returning verdicts on the issue of malice, meaning that the judge could not explain to the jury whether the relevant occasions were privileged, and for what purposes. The jury could therefore not decide whether the purpose for which the privileged occasions were used was an improper purpose, being the central issue in relation to determining malice: [41].

- The directions also left open the 'alternative case' that malice would be made out if the defendant lacked an honest belief in the truth of the statement being published on the privileged occasion. That proposition was usually, but not always true, and may not have been on at least some of the occasions with which the jury was concerned: [46]. The jury also received no direction as to the weight of the burden of proof to discharge: [47].

- Insofar as the joint judgement in *Roberts v Bass* (2002) 212 CLR 1 could be interpreted as adopting a distinction between different kinds of recklessness in the law of defamation, it should not be followed in Hong Kong: [49]-[50].

6. **Arbitration: enforcement of arbitral awards**

Astro Nusanara International BV and Others v PT First Media TBK **[2018] HKCFA 12**

Decision date: 11 April 2018

Ma CJ; Ribeiro PJ; Tang PJ; Fok PJ; Reed NPJ

The eight respondent companies were members of a Malaysian media group (**Astro**). Astro entered into a joint venture with companies in an Indonesian conglomerate, which included First Media. A Subscription and Shareholders Agreement (**SSA**) provided for arbitration to the Singapore International Arbitration Centre (**SIAC**), applying Singapore law. After the venture broke down, Astro commenced arbitration, and successfully applied under the 2007 SIAC Rules, r s 24(b), to have the 6th, 7th and 8th respondents joined to the arbitration (**the Additional Parties**), being companies which were never party to the SSA. Astro obtained arbitral awards and sought to enforce them in Singapore and Hong Kong. The Singapore Court of Appeal ultimately set aside the enforcement orders in Singapore in relation to the Additional Parties, finding that r 24(b) did not empower the tribunal to order the joinder of those parties.

Lippo did not resist enforcement in Hong Kong, believing they had no assets there; however, Astro subsequently obtained a garnishee order attaching to a debt due to First Media. First Media applied for an extension of time to set aside the Hong Kong enforcement orders. This was on the basis that the arbitration agreement was not valid under the law to which the parties subjected it, per the New York Convention on the Recognition and Enforcement of Arbitral Awards, s 44(2). The application was stayed pending the above-mentioned judgment from the Singapore Court of Appeal. After judgment was delivered, the primary judge refused leave to extend time to resist enforcement. The issue for the Hong Kong Court of Final Appeal was whether leave should be granted to extend time.

Held:

- The Court allowed the appeal and granted leave. The courts below had erred in principle in the approach adopted to exercising the discretion, so as to downgrade the critical absence of a valid arbitration agreement between First Media and the Additional Parties. They thereby failed to take proper account of a relevant matter. This justified the interference of the Court with the exercise of discretion: [68]. Moreover, the courts below should not have given weight to First Media's deliberate decision not to set aside the orders in Hong Kong, or the fact that the awards had not been set aside in Singapore. To do so was contrary to the choice of remedies principle embodied in s 44(2): [78]-[80].

- To refuse an extension of time would deny First Media a hearing where its application had decisively strong merits, and would penalise it for a delay which had caused Astro no uncompensable prejudice: [87].

Other international decisions of interest

7. **Contracts: availability of 'negotiating damages'**

Morris-Garner and Anor v One Step (Support) Ltd **[2018] UKSC 20**

Decision date: 18 April 2018

Lady Hale; Lord Wilson; Lord Sumption; Lord Reed; Lord Carnwath

The first appellant agreed to sell a 50% interest in her business to Mr and Mrs Costelloe. The claimant company (**One Step**) was incorporated as a vehicle for the transaction and the parties managed the business together. In 2004, the working relationship began to break down. In December 2006, the first appellant resigned as a director and sold her shares to the Costelloes for £3.15m under deadlock provisions in the shareholder's agreement. She and the second appellant entered into restrictive covenants not to compete with One Step or solicit its clients without consent for three years. The first appellant also agreed to keep information concerning its business transactions confidential during this period. In July 2006, the appellants incorporated another company (**Positive Living**), and in 2007, that company began to compete with One Step. In September 2010, the appellants sold their shares in Positive Living for £12.8m.

The primary judge held that One Step was entitled to claim '*Wrotham Park* damages' (**negotiating damages**) for breach of covenant, being an amount as would have been notionally agreed between the parties, acting reasonably, as the price for releasing the appellants from their obligations in 2007. The issue for the Supreme Court was whether the judge was correct to find that One Step were entitled to such damages, as opposed to ordinary compensatory damages.

Held:

- The Court allowed the appeal. In certain circumstances, the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset, even in the absence of pecuniary losses which are measurable in the ordinary way. This is true, for example, of the right to control the use of land, intellectual property, or confidential information. The imaginary negotiation is merely a tool for arriving at that value: [91]-[93].

- Where a breach of contract has caused the claimant to suffer economic loss, the loss should be measured as accurately as possible. The deliberate nature of the breach, the difficulty of establishing precisely the consequent financial loss, and the claimant's interest in preventing the defendant's profit-making activities, did not justify the award of a non-compensatory monetary remedy: [97]. This was a familiar type of loss, being a loss of profits and possibly of good will, for which damages were quantifiable in a conventional manner: [98]. When the breaches were viewed cumulatively, the case was not one where the breaches resulted in the loss of a valuable asset protected by the right which was infringed: [99].

8. **Equity: nature of the solicitor's equitable lien**

Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited **[2018] UKSC 21**

Decision date: 18 April 2018

Lady Hale; Lord Kerr; Lord Wilson; Lord Sumption; Lord Briggs

The claimants were injured in accidents involving vehicles insured by Haven Insurance (**the appellant**). They entered into conditional fee agreements (**CFAs**) with Gavin Edmondson Solicitors (**the respondent**) using the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (**the Protocol**). A Client Care Letter provided with each CFA stated that the client was responsible for the respondent's *"fees and expenses only to the extent [recoverable] from the [appellant]"*, and *"if you win, you pay nothing"*.

The Protocol enabled a defendant's insurer to be informed of claims by a claimant's solicitor through an online portal. Where liability was admitted, it allowed for a negotiated settlement or court-determined quantum at minimal cost, and was also designed to ensure that solicitors were paid their fixed costs and charges direct by insurers. Upon notification of the claims, the appellant offered to settle direct with the claimants, on terms which did not include provision for the respondent's costs. Settlements were reached. The respondent brought a claim seeking equitable enforcement of its solicitors' lien. The issues on appeal were whether the retainers contained a sufficient contractual liability to support the equitable lien on conventional grounds, and in the alternative, if equity should intervene in the absence of a contractual liability.

Held:

- The Court dismissed the appeal, for different reasons to the Court below. The Court of Appeal had erred in finding that the claimants did not have any contractual liability to pay the respondent's charges. On the assumption that the Client Care letter was part of the retainer or a collateral contract, it did not destroy the basic liability of the claimants for the respondent's charges. It merely limited the recourse from which the respondent could satisfy the liability to the amount of its recoveries from the insurer: [40]-[44].

- Applying the conventional analysis, it was clear that the settlement debts owed their creation, to a significant extent, to the respondent's services under the CFAs. Once the appellant was notified that the claimants had retained solicitors under CFAs, and that those solicitors were proceeding under the RTA Protocol, they had the requisite notice or knowledge of the respondent's interest in the settlement debts: [45]-[46]; [50]. The Court of Appeal was wrong to reformulate the equitable lien to the effect that equity would protect solicitors from any unconscionable interference with their expectations in relation to recovery of their charges: [58].