Court of Appeal
Supreme Court
Sydney

Decisions of interest

18 March 2019 – 29 March 2019

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: motor vehicle accident; whether decision-making process was impermissibly segmented**

   Bezer v Bassan **[2019] NSWCA 50**

   Decision date: 21 March 2019

   Macfarlan JA, Leeming JA, Payne JA

   On 6 September 2012, Mr Bezer and Mr Bassan were the occupants of a car that crashed about 20km south-west of Mendooran, NSW. The vehicle travelled about 50m off the road before tumbling or rolling a number of times, and then coming to rest. Mr Bezer was seriously injured and had to be extracted by emergency workers. Mr Bassan sustained only minor injuries, and was able to climb from the vehicle.

   Mr Bezer claimed damages from Mr Bassan in proceedings in the District Court. The sole issue on liability concerned who was driving the car at the time. Mr Bezer asserted that it was Mr Bassan; Mr Bassan asserted that it was Mr Bezer.

   After a 25 day hearing, the primary judge held that Mr Bezer was the driver and gave judgment in favour of Mr Bassan.

   Mr Bezer appealed. The primary ground of appeal urged by Mr Bezer was that the primary judge's approach to determining who was the driver of the vehicle involved impermissible segmentation of the decision-making process.

   Held:

   - The appeal was dismissed: [83], [84], [138].
   - All three judges affirmed the fundamental principle that a tribunal of fact must weigh the whole of the evidence relevant to an issue before determining whether the party bearing the legal onus has succeeded on that issue: [82], [91], [139].
   - Applying that principle, Leeming and Payne JJA held that the primary judge inappropriately engaged in a segmented approach to finding the facts relevant to the ultimate issue of whether Mr Bassan was the driver of the vehicle: [96], [105], [110], [140]-[141].
   - Macfarlan JA disagreed on this point, concluding that though some of the primary judge's language should have been avoided, the decision-making process had not been impermissibly segmented: [80]-[82].
   - All three judges agreed that to the extent there was such an error, it was not material, and there would be no substantial wrong or miscarriage of justice occasioned in dismissing the appeal. This was because the objective and expert evidence so strongly indicated that Mr Bezer was the driver that a court could not have rationally determined otherwise: [82], [134], [142].

2. **Private international law: stay of proceedings; exclusive jurisdiction clauses**

Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd **[2019] NSWCA 61**

Decision date: 29 March 2019

Bathurst CJ, Bell P, Leeming JA

Australian Health & Nutrition Association Ltd ('Sanitarium') and Rebel Sport Ltd ('Rebel') conducted a promotion in 2017, where purchasers of Sanitarium products (like UP&GO) could obtain vouchers to spend at Rebel Sport stores. Two contracts underpinned the promotion.

First, a Risk Transfer Agreement ('RTA') was entered into by Sanitarium, Emirat Ltd ('Emirat'), and Hive Marketing Group Pty Ltd ('Hive'). Under that agreement, Sanitarium paid Emirat approximately $650,000 plus GST in return for Emirat assuming all financial liability for redemptions of gift vouchers up to the value of approximately $14 million. In the RTA, Hive was described as Emirat's local agent, assisting it in the provision of the promised services – which were effectively a form of commercial insurance. The RTA was governed by English law and contained an English exclusive jurisdiction clause.

Second, Rebel and Sanitarium entered into a second agreement with Hive, which provided for the reimbursement of Rebel by Hive of the value of the vouchers redeemed at Rebel Stores. That contract was governed by NSW law, and contained a non-exclusive jurisdiction clause for the courts of NSW.

A dispute arose in relation to the reimbursement of Rebel, which had honoured approximately $1.67 million worth of vouchers. Sanitarium and Rebel commenced proceedings in the Supreme Court against Hive and Emirat. Emirat has no presence in the jurisdiction (being a UK company), so was served with process pursuant to UCPR r 11.4. Pursuant to r 12.11, Emirat filed a notice of motion without entering an appearance. By that notice, it sought a stay or dismissal of the proceedings, claiming the protection of its exclusive jurisdiction clause under the RTA. The primary judge enforced the exclusive jurisdiction clause for the courts of England, with the result that the proceedings in NSW against Emirat were stayed. The proceedings against Hive remain on foot. Sanitarium and Rebel sought leave to appeal, arguing that the primary judge erred in principle in the exercise of his discretion to stay part of the proceedings.

Held:

- Leave to appeal was granted because of the importance of the question raised, but the appeal was dismissed: [1], [41], [105].
- The primary judge made no error of principle. Decisions concerning the enforcement of exclusive jurisdiction clauses when not all parties to proceedings are bound by those clauses call for finely-balanced exercises of discretion; here, the primary judge made no error in principle: [92]-[93], [98], [104].

Other Australian intermediate appellate decisions of interest

3. **Administrative law: migration; protection visas; relationship between phrases 'well-founded fear' and 'real chance'**

***AON15 v Minister for Immigration and Border Protection* [2019] FCAFC 48**

Decision date: 18 March 2019

Besanko J, Middleton J, and Mortimer J

The appellant is a Pakistani national from an area of Pakistan called the Upper Kurram Agency. He is a Shia Muslim of Pashtun ethnicity, and a member of the Turi tribe. He applied for a protection visa, fearing violence in the Kurram Agency. The Minister refused to grant him a visa on 15 July 2013. Before the Administrative Appeals Tribunal, the appellant expanded his claims somewhat, providing further evidence in post-hearing written submissions. On 25 March 2015, the AAT affirmed the Minister's decision, concluding that the violence in the region had 'dissipated to a significant extent'. The appellant sought judicial review in the Federal Circuit Court on two grounds. First, the appellant argued that in its assessment of the levels of violence in the region at the relevant times, the AAT had failed to properly take into consideration relevant material before it. Second, the appellant argued that the AAT had misunderstood and misapplied the 'real chance' test. The appellant submitted that in determining his claim that he feared 'generalised violence', the Tribunal had erred in taking into account irrelevant considerations, namely whether he would be specifically targeted, and whether there were 'no particular factors which [would] increase the risk of the applicant being harmed', in the context of the attacks described in the evidence. The Federal Circuit Court upheld the Tribunal's decision. The appellant raised two grounds of appeal in the Federal Court. Those grounds substantially reiterated the arguments put to the primary judge, and asserted that the primary judge had erred in dismissing those arguments at first instance.

Held:

- The appeal was dismissed with costs: [9], [82].
- The first ground failed because the Full Court did not accept the basic premise of the appellant's argument, namely, 'that the Tribunal overlooked relevant and cogent evidence as to the incidence of violence in the appellant's home area'. Viewed as a whole, the Tribunal's reasons did not display the jurisdictional error that the appellant contended for: [1], [54]-[55].
- The second ground also failed. The Tribunal did not err in taking into account the matters which the appellant submitted were irrelevant. Rather, it correctly considered those matters as part of an assessment of whether his fear of persecution was well-founded. The Full Court discussed the relationship between the phrases 'well-founded fear' and 'real chance', and found that though substituting the latter for the former has its dangers, the Tribunal did not err in its understanding or application of the statutory test: [6], [8], [30]-[52], [76]-[77].

4. **Workers' compensation: hearing loss; inconsistency of laws under *Constitution* s 109**

***Return to Work Corporation of South Australia v Renfrey* [2019] SASCFC 26**

Decision date: 21 March 2019

Kourakis CJ, Nicholson J, Parker J

Mr Renfrey was employed by TNT Express from 1978 to 2011. When he was first employed, his workers' compensation entitlements were governed by the *Workmen's Compensation Act 1971* (SA). From 30 September 1987, they were governed by the *Workers Rehabilitation and Compensation Act 1986* (SA) (the 'WRC Act'). Under the WRC Act, the Return to Work Corporation ('RTWC') was liable to make compensation payments for injuries that Mr Renfrey suffered in the course of his employment. From 1 July 2008, TNT Express became a licenced corporation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the 'SRC Act'); from that date, the workers' compensation entitlements of TNT Express employees were governed by the SRC Act. On 15 February 2013, Mr Renfrey gave notice of, and made a claim for, noise induced hearing loss. RTWC rejected the claim. It relied on s 113(2) of the WRC Act, which provides that the whole of a worker's noise-induced hearing loss 'shall be deemed to have occurred immediately before notice was given and, subject to any proof to the contrary, to have arisen out of employment in which the worker was last exposed to noise capable of causing noise induced hearing loss'. Because he made his claim on 15 February 2013, when no longer a TNT Express employee, RTWC contended that it was not liable to compensate him under the WRC Act. And further, it contended that because when he was last employed by TNT Express he was not subject to the WRC Act, any entitlement to compensation he did have was governed exclusively by the SRC Act. Mr Renfrey took his claim to the South Australian Employment Tribunal (SAET), where the President determined that he was entitled to compensation under the WRC Act. RTWC appealed to a Full Bench of the SAET, which dismissed the appeal. RTWC then appealed to the Full Court of the Supreme Court of South Australia. Before the Full Court, the two main issues concerned the interpretation of s 113(2), and whether there was any inconsistency between the SRC Act and the WRC Act, such that the latter was inoperable to the extent of the inconsistency pursuant to s 109 of the *Constitution* (Cth).

Held:

- Appeal dismissed: [67]-[69].
- The term 'employment' in s 113(2) was interpreted to mean 'employment with respect to which the WRC Act confers a worker's compensation entitlement for hearing loss'. Consequently, s 113(2) deemed the whole of Mr Renfrey's loss to have occurred during his employment with TNT Express irrespective of when notice was given: [57]-[58].
- Because Mr Renfrey's injury arose before RTWC was licensed, the SRC Act did not apply to it, and there was no inconsistency between that Act and the WRC Act so far as his entitlements were concerned: [64], [66].

Asia Pacific decisions of interest

5. Insurance: accident; malaria contracted from mosquito bite

Supreme Court of India

The Branch Manager of National Insurance Co Ltd V Bhattacharjee **Civil Appeal No 2614 of 2019**

Decision date: 6 March 2019

Chandrachud J

Debashis Bhattarcharjee was the manager of a tea factory in Mozambique. In India, he held an insurance policy. The policy was intended to provide insurance to a person who obtains a loan to buy, build, renovate, or repair a dwelling. Section II of the policy also insured the borrower against personal accidents, including 'death due to accident'. While working in Mozambique, Mr Bhattarcharjee was bitten by a mosquito, contracted encephalitis malaria, and died due to multi-organ failure. Mr Chattarcharjee's family claimed under the policy. The insurer declined the claim. The family filed a complaint with the District Consumer Disputes Redressal Forum. Before the Forum, the insurer argued that death due to malaria caused by a mosquito bite was a result of infection or disease; it was not a death due to accident. On 28 February 2014, the District Forum ordered the insurer to honour the claim. The insurer appealed to the West Bengal State Consumer Disputes Redressal Commission, which upheld the decision of the District Forum. The insurer appealed again to the National Consumer Disputes Redressal Commission. Noting that the policy did not define the term 'accident', the National Commission looked to dictionary definitions, focusing on the unexpected nature of accidents, and the fact that they cause injuries or harm. The National Commission concluded that:

> 'It can hardly be disputed that a mosquito bite is something which no one expects and which happens all of a sudden without any act or omission on the part of the victim. … it would be difficult to accept the contention that malaria due to mosquito bite is a disease and not an accident.'

Accordingly, the National Commission upheld the District Forum's decision. The insurer appealed to the Supreme Court of India.

Held:

- Appeal allowed, and the orders of the National Commission set aside: [23].
- After reviewing Indian and international authorities, Chandrachud J concluded that given the prevalence of malaria in Mozambique, being bitten by a mosquito carrying malaria there could not be regarded as an accident, and nor could developing encephalitis malaria as a result: [20].
- The insurer, however, had paid out the claim before judgment was given; Chandrachud J ordered that no recoveries of the sum shall be made: [22].

6. **Administrative law: public protection orders; appeal rights; fundamental rights**

New Zealand Court of Appeal/Te Kōti Pīra O Aotearoa

R (CA464/2018) v Chief Executive of the Department of Corrections **[2019] NZCA 60**

Decision date: 20 March 2019

French J, Cooper J, Winkelmann J

The *Public Safety (Public Protection Orders) Act 2014* provides for the making of public protection orders and interim detention orders. The Chief Executive of the Department of Corrections had filed an application in the High Court seeking both a public protection order and an interim detention order in respect of R. Under s 107 of the *Public Safety Act*, an interim detention order can only be made before an application for a public protection order is determined. A judge of the High Court had imposed an interim detention order on R. R appealed from that order. While that appeal was being heard, a different judge of the High Court, Whata J, was considering the application for a public protection order. Shortly after the appeal hearing, What J decided that the Chief Executive had established a case for a public protection order, but sought further submissions on less onerous alternatives. In light of those further submissions, Whata J concluded that less onerous alternatives were inappropriate, but directed the Chief Executive to consider seeking an assessment of R under s 29 of the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003*. Whata J's first decision made it unnecessary to decide the appeal, insofar as it challenged the justification of the interim order. However, the appeal also raised two jurisdictional questions which the Court of Appeal considered it important to address. First, is an appeal from a decision to impose an interim detention order as of right, or is leave required to appeal? That turns on whether a decision to impose an interim detention order is an interlocutory decision. Second, did the High Court have jurisdiction to impose an interim detention order when the application for a public protection order was only made after R had ceased to be subject to intensive monitoring conditions? This was a question concerning the interpretation of s 107(1)(b) of the *Public Safety Act* which provides that 'This section applies when, before an application for a public protection order is finally determined, 1 or more of the following events occur: … (b) a respondent who is subject to an extended supervision order ceases to be subject to conditions of the kind referred to in section 7(1)(b) or (c)'. The conditions in s 7 include intensive monitoring conditions.

Held:

- On the first issue, the Court held that, in light of the great burden that an interim detention order places on fundamental rights, a person subject to such an order may appeal as of right from it: [24]-[26].

- On the second issue, the Court held that the High Court lacked jurisdiction to impose an interim detention order in this case. The terms of s 107(1)(b) require that an application for a public protection order have been made (but not yet determined) before the event specified in s 107(1)(b) occurs: [34], [38].

Other international decisions of interest

7. **Taxation: effect of treaty between US and Yakama Nation on operation of Washington Revised Code §§82.36.010(4), (12), (16)**

Supreme Court of the United States

Washington State Department of Licensing v Cougar Den, Inc. **586 U.S. __ (2019)**

Decision date: 19 March 2019

Roberts CJ and Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh JJ

§§82.36.010(4), (12), and (16) of the Washington Revised Code require importers of motor vehicle fuel to be licensed, and impose taxes by the gallon for fuel brought into the State by "ground transportation", including "railcar, trailer, [or] truck". In 1855, the United States and the Yakama Nation, a federally recognised tribe, entered into a treaty. Under the terms of the treaty, the Yakama Nation granted the US approximately 10 million acres of land. In return, the US made a number of promises, including a promise to respect certain rights reserved by the Yakamas. Those rights include "the right, in common with citizens of the United States, to travel upon all public highways" (Art III). Cougar Den Inc ('Cougar Den') is a wholesale fuel importer, owned by a member of the Yakama Nation, incorporated under Yakama law, and designated by the Yakama Nation as its agent to obtain fuel for members of the tribe. Cougar Den imports fuel from Oregon by truck, and uses public highways in Washington to transport the fuel to the Yakama Reservation (in Washington), where it sells the fuel to Yakama-owned petrol stations. In December 2013, the Washington State Department of Licensing assessed Cougar Den the sum of $3.6 million in taxes, penalties, and licensing fees, on the basis that Cougar Den was caught by §§82.36.010(4), (12), and (16). Cougar Den appealed the assessment to an Administrative Law Judge, arguing that the 1855 treaty pre-empted the provisions of the Code insofar as they applied to Cougar Den. The Judge agreed, and set aside the assessment, but the Department's Director subsequently overturned the Judge's order. An appeal to a Washington Superior Court overturned the Director's decision. The Director unsuccessfully appealed to the Washington Supreme Court. The Department sought review in the Supreme Court of the United States.

Held (by Ginsburg, Breyer, Sotomayor, Kagan and Gorsuch JJ):

- The majority affirmed the judgment of the Washington Supreme Court. The majority reasoned that: (1) 'a state law that burdens a treaty-protected right is pre-empted by the treaty'; (2) interpreting the treaty as the Yakamas understood it in 1855, 'the treaty protects the Yakamas' right to travel on the public highway with goods for sale'; and (3) the Washington Code 'taxes the Yakamas for traveling with fuel by public highway'. Therefore, the treaty pre-empts the operation of the Code: see the Opinion of the Court at 18, and Gorsuch J's concurring judgment at 3.

8. **Torts: maritime torts; dust diseases; extent of manufacturer's liability for failure to warn about harms likely to result from third-party additions to products**

Supreme Court of the United States

Air & Liquid Systems Corp et al v Devries et al **586 U.S. __ (2019)**

Decision date: 19 March 2019

Roberts CJ and Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh JJ

The appellants were manufacturers who produced equipment used on Navy ships. That equipment required asbestos insulation or parts in order to function as intended. Sometimes, the manufacturers incorporated the asbestos themselves; in these cases, with time, it sometimes became necessary for the Navy to replace asbestos insulation or parts. Other products were delivered in a 'bare-metal' state, requiring the Navy to add asbestos to them. Two Navy veterans, Kenneth McAfee and John DeVries, were exposed to asbestos while working on Navy ships. They subsequently developed cancer. They and their wives commenced tort proceedings against the manufacturers. They alleged that exposure to asbestos caused the cancer, and that the manufacturers were liable in negligence for failing to warn users of the dangers of using the 'integrated products' – that is, the fully functional products that resulted from adding asbestos insulation or parts to 'bare-metal' products. At first instance, the District Court granted summary judgment for the manufacturers on the basis of the 'bare-metal defence' – that is, the principle that manufacturers should not be held liable for harms caused by third-party parts added to their products after sale. The plaintiffs appealed, and the US Court of Appeals for the Third Circuit vacated that summary judgment, and remanded the matter to the District Court for determination. The Court of Appeals took the view that manufacturers should be held to a 'foreseeability' standard: if a manufacturer can foresee that their product will be used with asbestos insulation or parts, they are under a duty to warn about the dangers of the resulting integrated product. The manufacturer's appealed to the Supreme Court of the United States.

Held:

- The majority (Kavanaugh J writing for the Court, Roberts CJ, Ginsburg, Breyer Sotomayor and Kagan JJ agreeing) upheld the orders of the Court of Appeals (to remand the matter to the District Court), but disagreed with its reasoning: Opinion of the Court at 2, 10.

- In the maritime tort context, the Court held that neither the bare-metal approach nor the foreseeability approach was appropriate. Instead, it fashioned a new test. In the maritime tort context, 'a product manufacturer has a duty to warn when (i) its product *requires* incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger.' See the Opinion of the Court at 10.