Court of Appeal
Supreme Court
Sydney

Decisions of interest

2 September 2019 – 13 September 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: joint criminal enterprise; civil liability as between confederates**

   Bevan v Coolahan **[2019] NSWCA 217**

   Decision date: 5 September 2019

   Basten JA, Leeming JA, McCallum JA

   Ms Bevan, Mr Coolahan, and two others were taking illicit drugs, including crystal methamphetamine ('ice'). Having run out of drugs early one morning, they drove to the house of a drug dealer. Ms Bevan obtained more ice by giving the dealer her brother's iPod. All four of the young people then smoked it in a car park, using Ms Bevan's ice pipe. When Mr Coolahan was driving them back from the car park, he lost control of the car on a corner and crashed into a telegraph pole shortly after 3:30am. Ms Bevan was seriously injured. She commenced negligence proceedings in the District Court against Mr Coolahan and the owner of the car (who was one of the other passengers at the time). The primary judge dismissed Ms Bevan's claim on the basis that she was involved in a joint criminal enterprise ('JCE') with the defendants which precluded her from recovering damages from them. The primary judge then went on to notionally assess Ms Bevan's contributory negligence at 25%, and determined damages contingently. Ms Bevan appealed. The defendants cross-appealed against the notional assessment of contributory negligence. The key issues were: (1) whether Ms Bevan was involved in a JCE, such that Mr Coolahan's illegal acts (driving with a prescribed illicit drug in his system and/or negligent or dangerous driving) could be attributed to her; (2) whether it would be incongruous or inconsistent with the policy of the law to impose a duty on the defendants to take reasonable care while driving a co-offender (*Miller v Miller* (2011) 242 CLR 446; [2011] HCA 9); (3) whether s 54 of the *Civil Liability Act 2002* (NSW) displaced or altered the principles in *Miller*; (4) if the appeal was allowed, whether the primary judge had erred in her notional assessment of contributory negligence.

   Held:

   - By majority, appeal dismissed and cross-appeal dismissed: [34], [128]. McCallum JA would have allowed both the appeal and the cross-appeal: [155].
   - (1): Basten JA and Leeming JA held that Ms Bevan was involved in a JCE: [28], [53]. McCallum JA considered that on the defence pleaded, Ms Bevan was not involved in a JCE merely by virtue of being a passenger in the car: [144], [148].
   - (2): Basten JA and Leeming JA held that it would be incongruous to recognise a duty of care in the circumstances: [33], [53], [117]. McCallum JA considered that the defence of illegality was not established on the respondents' pleaded case and that it would not be incongruous in the circumstances to recognise that they owed Ms Bevan a duty of care: [132], [148], [152].
   - (3): Basten JA and Leeming JA held that s 54 did not relevantly displace or alter the principles in *Miller*, as they applied here: [24], [53], [92]. McCallum JA considered it unnecessary to address this issue: [132].
   - (4): The Court would have assessed Ms Bevan's contributory negligence at 50%: [35], [127], [154].

2. Torts: battery; application of *Civil Liability Act 2002* (NSW)

***State of New South Wales v Ouhammi* [2019] NSWCA 225**

Decision date: 11 September 2019

Basten JA, Brereton JA, Simpson AJA

In December 2011, Mr Ouhammi was arrested by police while urinating in a public place in Sydney's east. He was heavily intoxicated. He was taken to Waverley Police Station and placed in a holding cell. The cell had a heavy perspex door that opened outwards. When shut, a sliding bolt secured the door. There was a small bench in the cell attached to the wall opposite the door, about one step away from the door. Mr Ouhammi was lying on the bench, facing the wall. An officer opened the door slightly and called to him. Within a few seconds, Mr Ouhammi rolled over and took a step towards the door. The officer quickly closed the door. Mr Ouhammi's thumb was caught in the door, was partially severed and, eventually, partially amputated. Mr Ouhammi commenced personal injury proceedings in the District Court, suing the State of New South Wales as vicariously liable for the officer's conduct. The primary judge found for Mr Ouhammi on the basis of negligent battery, and awarded damages of $82,000. The State sought leave to appeal, raising four issues: (1) whether the primary judge erred in failing to apply the *Civil Liability Act 2002* (NSW) ('CLA'); (2) which party bears the burden of proof where the tort of battery is alleged; (3) whether the officer's conduct was negligent in the circumstances; and (4) if the officer was negligent, the degree (if any) of contributory negligence, and the appropriate quantum of damages.

Held:

- Leave to appeal granted; appeal allowed: [46], [136], [203].
- (1): The primary judge erred in failing to apply the CLA. Section 3B excludes the operation of the Act where the conduct in question was intentional and done with intent to cause injury; but the Act can apply to intentional torts. Since the primary judge accepted that the officer did not intend to cause injury, he erred in failing to apply to the Act: [8]-[9], [51], [169]-[170].
- (2): Brereton JA and Simpson AJA held that s 5B of the CLA does not alter the longstanding approach to battery, which places the onus of negativing fault on the defendant: [105]-[109], [189]. Basten JA considered that the CLA places the onus on the plaintiff to establish a defendant's failure to exercise reasonable care and skill: [25]-[28].
- (3): Basten JA and Simpson AJA held that the officer was not negligent in the circumstances: [36]-[37], [195], [202]. Brereton JA considered that, exercising ordinary care and skill, the officer could have prevented the physical contact: [112]-[113].
- (4): Basten JA considered that, if the officer was liable, s 50(2) CLA would have applied to preclude any award of damages, or alternatively, ss 50(3), (4) would have applied to reduce any award: [40]-[41]. Brereton JA considered that s 50 was not engaged: [119]. Basten JA and Brereton JA considered that, on the assumption that the officer was liable, on the scale of the assessment of non-economic loss, the injury was likely around 23% of the most extreme case, and would warrant damages of $30,500, though Basten JA would have reduced that amount by 25% on account of Mr Ouhammi's intoxication: [44], [131].

Other Australian intermediate appellate decisions of interest

3. Equity: relationship between contractual and fiduciary obligations

Eaton v Rare Nominees Pty Limited **[2019] QCA 190**

Decision date: 13 September 2019

Philippides JA, McMurdo JA, Davis J

Rare Nominees Pty Ltd as Trustee for the Mackellar Family Superannuation Fund ('Rare') entered into a joint venture agreement ('the JVA') with E-Coastal Developments Pty Ltd ('E-Coastal'). Mr Eaton was the sole director and controlling mind of E-Coastal. Rare was one of a number of 'Contributors' under that agreement. The joint venture concerned the development and sub-division of some land owned by E-Coastal.

The JVA relevantly provided that:

- the 'legal relationship of the Parties under the Joint Venture shall be *contractual only*';
- E-Coastal was to account to the 'Contributors' for the 'Contributors' Entitlements', defined as a percentage of the 'Receipts', Receipts being 'all proceeds of any kind, whether of an income or capital nature, received in connection with or relating to the Project including … the proceeds of sale of the Asset or part of it … and any deposits forfeited pursuant to any contract for the sale … of the Asset or part of it';
- the 'only duties of any Party are those set out in this Agreement', and '[t]o the extent permitted by law … [duties] (including duties of a fiduciary nature) are excluded';
- 'No Party will acquire property nor borrow nor enter into any commitment or liability which is not provided for in this Agreement'.

While the project progressed to completion, E-Coastal did not pay out any Contributors' Entitlements to Rare. Rare commenced proceedings against Mr and Mrs Eaton in the District Court; by the time of trial, E-Coastal had gone into liquidation and been deregistered. Rare claimed that E-Coastal owed it fiduciary duties in the performance of its functions under the JVA. The primary judge held that E-Coastal did owe Rare such duties, had breached them, and that Mr Eaton was liable to Rare for knowingly assisting in the breach of those duties (pursuant to the second limb of *Barnes v Addy*). Mr Eaton appealed. The key issue on appeal was whether the primary judge erred in imposing a fiduciary relationship in the context of the JVA.

Held:

- Appeal allowed: [72], [84], [101].
- The primary judge erred in holding that a fiduciary relationship – albeit of a limited kind – arose between E-Coastal and Rare. The critical characteristic of fiduciary relationships identified by Mason J in the *Hospital Products Case* was not present: E-Coastal had not undertaken or agreed to act for or on behalf of or in the interests of Rare in the exercise of a power or discretion which would affect Rare's interests in a legal or practical sense. The fiduciary relationship and obligations imposed by the primary judge were inconsistent with the terms of the JVA; imposing such a relationship would operate to defeat, rather than give effect to, the legitimate expectations of commercial parties: [64], [67], [73], [82], [87].

4. **Constitutional law: s 109 inconsistency; political donations**

Awabdy & Anor v Electoral Commission of Queensland & Anor **[2019] QCA 187**

Decision date: 13 September 2019

Sofronoff P, Fraser JA, Douglas J

In March 2018, on an application by the Electoral Commission of Queensland ('ECQ'), a judge of the Supreme Court made a declaration that: 'sections 290 and 291 of the *Electoral Act 1992* (Qld) are not inconsistent with sections 314AB and 314AC of the *Commonwealth Electoral Act 1918* (Cth) within the meaning of s 109 of the Constitution.' Sections 290 and 291 of the *Electoral Act 1992* (Qld) place obligations on the agents of political parties registered in Queensland to report to the ECQ gifts or loans that exceed a certain value. Sections 314AB and 314AC of the *Commonwealth Electoral Act 1918* (Cth) place obligations on the agents or financial controllers of registered political parties, State branches of registered political parties, and political campaigners to lodge returns with the Australian Electoral Commission declaring amounts received, paid, or incurred each financial year. The appellant appealed against the primary judge's declaration. The Attorney-General for the Commonwealth intervened in support of the appellant. The Attorney-General for Queensland had intervened in aid of the ECQ at first instance, and remained a party to the proceedings on appeal. Broadly, the key issues on appeal were: (1) what was the relevant Commonwealth law, what was the relevant State law, and how should their subject matters be characterised?; (2) was there a direct inconsistency between the Commonwealth law and the State law?; (3) was there an indirect inconsistency between the Commonwealth law and the State law?

Held:

- Appeal dismissed: [51]-[53].
- (1): In identifying the relevant Commonwealth law for s 109 purposes, it is important to do so with precision and with regard to the subject, scope, and purpose of the law. In this case, it was not merely ss 314AB and 314AC; rather, the relevant Commonwealth law was the whole of pt XX of the *Commonwealth Electoral Act*. The subject matter of that law was the integrity of the Commonwealth Parliament; the Act said nothing about State elections or about how payments to political parties might affect State elections. The State law was pt II of the *Electoral Act*, and its subject matter was the integrity of Queensland state elections: [24], [30], [32], [36].
- (2): There was no direct inconsistency between the Commonwealth law and the State law: though the two laws would require disclosure of the same payments in some circumstances, the obligations could be simultaneously complied with: [37].
- (3): There was no indirect inconsistency between the two laws: the Commonwealth law did not evince an intention to cover the field concerning political payments generally; the two laws were directed to different purposes (the integrity of federal and state elections respectively): [38]-[40].

Asia Pacific decisions of interest

5. Civil procedure: Special Advocates; open justice

Court of Appeal of New Zealand/Te Kōti Pīra O Aotearoa

Dotcom v Attorney-General **[2019] NZCA 412**

Decision date: 6 September 2019

Miller J, Brown J, Clifford J

Mr Dotcom commenced civil proceedings against the Government Communications Security Bureau ('GCSB'), seeking damages for breach of his privacy interests. GCSB admitted liability, recognising that it had acted unlawfully in intercepting Mr Dotcom's communications, as he held a resident-class visa that precluded surveillance. In proceedings in the High Court to determine the damages to which Mr Dotcom was entitled, GCSB made an application pursuant to s 70 of the *Evidence Act 2006* (NZ) that certain information not be disclosed in the proceeding on the basis that it related to matters of State, and that the public interest in non-disclosure outweighed the public interest in disclosure. At the hearing of the s 70 application, Mr Dotcom was represented, but neither he nor his representatives were privy to the communications that GCSB wished to keep secret. Instead, the relevant information was disclosed to a Special Advocate, Mr Grieve QC. Mr Grieve was appointed by the Court on ambiguous terms; it was unclear whether he had authority to decide what case to advance; it was clear, however, that his brief extended to advancing arguments that were available to Mr Dotcom. Mr Grieve negotiated the disclosure of some material and agreed to summaries of some material. Taking independent advice about the remaining material, Mr Grieve concluded that he could not resist GCSB's s 70 application with respect to that material. Dissatisfied with this conclusion, Mr Dotcom sought to have Mr Grieve dismissed. Gilbert J dismissed that application, and granted GCSB's application for a s 70 order. Mr Dotcom appealed from that interlocutory decision, submitting that the s 70 hearing had miscarried because of the way in which Mr Grieve's role was constituted and performed; he invited the Court of Appeal to engage in the s 70 balancing exercise for itself.

Held:

- Appeal dismissed: [74].
- The Special Advocate process did not miscarry: though Mr Grieve was obliged to ascertain Mr Dotcom's wishes as to the s 70 process, his role was to pursue Mr Dotcom's wishes only to the extent that he, Mr Grieve, thought appropriate, exercising his independent judgment: [65]-[67].
- The primary judge's decision on disclosure was correct. The general nature of the information subject to the s 70 order was known to Mr Dotcom, such that he would not lose the opportunity to have a fair trial on damages; and the public interest in non-disclosure of the documents in question outweighed the interest in disclosure: [70]-[73].

6. **Contracts: rectification; leases; Māori land trusts**

Court of Appeal of New Zealand/Te Kōti Pīra O Aotearoa

Kusabs v Staite **[2019] NZCA 420**

Decision date: 9 September 2019

Cooper J, Brown J, Williams J

The trustees of the Whaoa Trust own Māori freehold land in Reporoa, an area in the Rotorua District of the north island of Aotearoa/New Zealand. In 1994, they leased the land to the Tumunui Trust. Mr Edward Moke was a trustee of both trusts, and was involved in negotiating the lease ('the Tumunui Lease'). The lease was for a term of 21 years, running from 13 December 1992. The rent was fixed for the first 10 years. Thereafter, it was to be calculated according to a formula contained in the lease. For the purposes of that formula, the value of all improvements made on or to the land since 13 December 1961 was deducted from the capital value of the land. Successive tenant farmers had occupied the land from 13 December 1961 until the Tumunui Trust took possession in 1989. There was some ambiguity as to whether the Trust would take the land as the assignee of the previous leaseholder's interest, or whether a new lease would be negotiated. The 1994 Lease was executed to resolve that ambiguity. In 2002, a valuation company was engaged to determine the rent to be paid under the Tumunui Lease after the first 10 years of its running. The trustees of the Whaoa Trust were dissatisfied with the results of that valuation, and after unsuccessfully challenging it in the Land Valuation Tribunal, commenced proceedings in the High Court in 2009. There, they sought rescission of the 1994 lease on the basis that Mr Moke, with the knowledge of the Tumunui Trust, had breached the fiduciary duty he owed to the Whaoa Trust. The trustees of the Whaoa trust alleged that the terms of the 1994 Lease unduly favoured the Tumunui Trust in both their duration and in the fact that the method for calculating the rent to be paid resulted in an amount significantly below market rate. The primary judge held that Mr Moke had breached his fiduciary duty owed to the Whaoa Trust. His Honour held, however, that Mr Moke was not responsible for what his Honour took to be an error in the rental provision – namely, that it provided for deductions for improvements since 13 December 1961. The primary judge declined to order rescission, but instead made an order for rectification, removing the words which he considered to have been included by mistake. The Tumunui Trust appealed from that order.

Held:

- Appeal allowed; the order for rectification was set aside. It was unnecessary to decide the fiduciary duty issue: [120]-[121].

- The primary judge erred in ordering rectification. Rectification was not a remedy sought by either party, and the respondents had not sought, at first instance, to show that there was a common intention that had not been properly recorded in the Tumunui Lease. The evidence did not establish any such mistake; indeed, the burden of the oral evidence was that the Lease accurately recorded the parties' intentions – and the parties' subsequent conduct did not suggest otherwise: [69], [99], [110].

Other international decisions of interest

7. **Judicial review: habeas corpus; review of unit placement decisions in prisons**

Court of Appeal for Saskatchewan

***Mercredi v Saskatoon Provincial Correctional Centre et al* 2019 SKCA 86**

Decision date: 9 September 2019

Barrington-Foote J, Ottenbreit J, Whitmore J

On 10 January 2018, corrections officials decided to assign Mr Mercredi, an inmate at Saskatoon Provincial Correctional Centre ('SPCC'), a low-security designation, and also decided to move him to Unit A, one of the low-security units at SPCC. Mr Mercredi objected to being moved to Unit A on the basis that, compared to another low-security unit in which he had previously been placed (Overflow Unit 4), inmates in Unit A were detained in considerably more onerous conditions. Under the *Correctional Services Act* and the *Correctional Services Regulations*, there was no express obligation on corrections officials to provide Mr Mercredi with written reasons for the decision to downgrade his security designation or for the decision to move him to Unit A. Objecting to being placed in Unit A, Mr Mercredi applied to the Court of Queen's Bench for a writ of habeas corpus, arguing that imprisonment in Unit A constituted a deprivation of his residual liberty interests. The application judge dismissed his application, holding that the unit placement decision was made in a procedurally fair manner and was lawful. Mr Mercredi appealed to the Court of Appeal for Saskatchewan, submitting that the application judge erred in law in finding that the unit placement decision had been made in a procedurally fair manner. On appeal, there were essentially three issues: (1) by the time the appeal was heard, Mr Mercredi had been released, so determining whether his detention was lawful was strictly speaking moot; a threshold question for the Court of Appeal was therefore whether to hear the appeal; (2) whether procedural protections in the Act and Regulations impliedly excluded any other duties of procedural fairness; and (3) if the answer to (2) was 'no', whether the unit placement decision was made in a procedurally unfair manner.

Held:

- Appeal allowed: [3].
- (1): though the appeal was moot, the public interest in determining whether corrections officials owe a duty of procedural fairness to inmates in the context of unit placement decisions justified hearing the appeal: [24]-[25].
- (2): procedural protections in the Act and Regulations did not impliedly exclude the rules of procedural fairness in relation to unit placement decisions: [50].
- (3): Mr Mercredi did not receive reasons for, or an invitation to make representations about, the unit placement decision – a decision that had a significant impact on his residual liberty interests. In the circumstances, that constituted a denial of procedural fairness: [45].

8. Fundamental rights: freedom of expression

Court of Appeal for Ontario

***Langenfield v Toronto Police Services Board* 2019 ONCA 716**

Decision date: 12 September 2019

Doherty JA, Rouleau JA, Brown JA

Mr Langenfeld was a Toronto resident who regularly attended meetings of the Toronto Police Services Board ('TPSB'). The *Police Services Act* required such meetings to be open to the public. They were regularly held in an auditorium on the second floor of the Police Headquarters building in Toronto. In June 2017, the Toronto Police Chief ('The Chief') implemented a new security protocol at Police Headquarters, requiring persons entering the building to be 'wanded' with a metal detector, and to have their bags/purses examined. Mr Langenfeld refused to submit to these security procedures, was refused entry to the building, and consequently was unable to attend a TPSB meeting. He sought injunctive relief, preventing the Chief from continuing to implement the security the protocol. He sought that relief on various bases, including: the Chief lacked authority to implement the protocol and to subject meeting attendees to warrantless searches; the protocol infringed his right to freedom of expression under s 2(b) of the *Canadian Charter of Rights and Freedoms*; and the protocol was inconsistent with the TPSB's statutory obligation to hold meetings in public. The application judge held that the Chief lacked authority to implement the protocol, that the security protocol infringed s 2(b) of the *Charter*, and that there was no justification for that infringement. (Section 1 of the *Charter* provides that: 'The [*Charter*] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.') She made a declaration to that effect. The Chief appealed. He submitted that the protocol did not limit Mr Langenfeld's right to freedom of expression under s 2(b), or, in the alternative, that if the protocol does limit that right, the limit is prescribed by law and justified, within the meaning of s 1.

Held:

- Appeal allowed: [89].
- Like the application judge, the Court of Appeal found that the security protocol did, prima facie, limit Mr Langenfeld's right to freedom of expression under s 2(b): [48].
- So far as the s 1 analysis went, however, the Court of Appeal held that the application judge had erred in finding that the Chief lacked power to implement the protocol – and therefore that it was not 'prescribed by law'. The Court held that, as an occupier, the Chief had authority at common law to impose the protocol, that the protocol was accordingly 'prescribed by law', and that it could be demonstrably justified to be a reasonable limit on Mr Langenfeld's right to freedom of expression: [61], [68], [78]-[88].