Court of Appeal
Supreme Court
Sydney

Decisions of interest

24 June 2019 – 5 July 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.

Contents

New South Wales Court of Appeal decisions of interest

1. **Torts: assessment of damages; non-economic loss; standard of review**

   White v Redding **[2019] NSWCA 152**

   Decision date: 24 June 2019

   Macfarlan JA, Gleeson JA, White JA

   In January 2014, when she was 16 years old, a tennis ball hit Ms Redding's left eye. The ball had been hit by Mr White while he was playing an informal game of cricket in the Function Room at Manly Lifesaving Club. Ms Redding was not participating in the game – she was at the Club because she had been assisting with a barbeque. The accident caused Ms Redding to suffer serious injuries, resulting in a 97% loss of vision in her left eye.

   Ms Redding brought negligence proceedings against the Club and Mr White. The claim against the Club settled. In the claim against Mr White, a judge of the District Court found in favour of Ms Redding, and awarded her $692,806.30 in damages.

   Mr White appealed. On appeal, there were three issues. First, whether the primary judge erred in assessing the severity of Ms Redding's non-economic loss as 55% of a most extreme case. Second, whether the primary judge erred in assessing Ms Redding's loss of future earning capacity. And third, whether the primary judge erred in making an allowance of $25,000 for the possible cost to Ms Redding of contact lenses.

   Held:

   - Appeal dismissed: [56], [57], [79].
   - On the first issue, Gleeson JA and White JA considered that the test for appellate review of an assessment of the severity of non-economic loss under s 16 of the *Civil Liability Act 2002* (NSW) is the 'deferential' standard from *House v The King* (1936) 55 CLR 499. Macfarlan JA considered that the test is the 'correctness' standard from *Warren v Coombes* (1979) 142 CLR 531. On either view, the Court held that the primary judge did not err in his assessment of Ms Redding's non-economic loss: [19]-[26], [30], [61]-[78], [80], [96].
   - On the second issue, the Court held that there was no error in the primary judge's assessment of Ms Redding's loss of future earning capacity, notwithstanding the absence of evidence of the earnings of persons employed in potentially relevant occupations: [48], [57], [79].
   - On the third issue, the Court held that the primary judge did not err in making an allowance for the possible cost of contact lenses: [55], [57], [79].

2. Civil procedure: revocation of grant of probate; leave to amend cross-claim

Photios v Photios **[2019] NSWCA 158**

Decision date: 27 June 2019

Bell P, Gleeson JA, Leeming JA

Henry Basil Photios died having made a number of wills. The appellant, David Photios, was his son. The respondent, Lana Photios, was the deceased's second wife. In October 2016, a grant of probate in common form was made in respect of the deceased's '2012 Will'. The appellant then filed a cross-claim. In April 2018, the appellant sought leave to file a further amended statement of cross-claim ('FASOCC'). By that FASOCC, the appellant sought to have the October 2016 grant of probate revoked, and to have a grant of probate made in solemn form of the deceased's '2010 Will'. The basis for the proposed amendment was an argument that when he executed the 2012 Will, the deceased lacked testamentary capacity. Relevantly, the 2010 Will gave the deceased's one-third interest in a Sydney property to the appellant, whereas under the 2012 Will, that interest formed part of the residuary estate to which the respondent was the sole beneficiary. The primary judge accepted that there was a prima facie case that the deceased lacked testamentary capacity at the time he executed the 2012 Will. Despite this, the primary judge refused allow the amendment. Her Honour found that the appellant was aware of the 'facts, matters and circumstances' upon which he sought to base the testamentary capacity argument when he had acquiesced in the grant of probate of the 2012 Will; that he had made no earlier attempt to have it revoked and had prosecuted proceedings on the basis that it was the relevant will; and that he now, 'for apparently tactical reasons', sought to raise the testamentary capacity issue. In any event, her Honour considered that the additional claims in the proposed FASOCC were 'bound to fail'. On appeal, the issues were: (i) whether, having accepted that the appellant had a prima facie case on testamentary capacity, the primary judge erred in refusing leave and in holding that the proposed amendment was bound to fail, in seeking to determine contested facts in an interlocutory application, and in finding that the appellant was raising testamentary capacity for 'apparently tactical reasons'; and (ii) whether the primary judge erred in finding that the appellant's 'acquiescence' prevented him from filing the proposed FASOCC.

Held:

- Appeal allowed: [84], [99], [100].
- On the first issue: the Court held that the primary judge erred in respect of each of the matters complained of. Where there is evidence supporting an arguable case, an application to revoke a grant of probate in common form should only be refused where its prosecution would amount to an abuse of process: [40], [42]-[52].
- On the second issue: acquiescence is an 'elusive and somewhat problematic legal term'; as an evidentiary question, its aptness to be decided on a summary basis is doubtful. In the circumstances, the appellant's alleged 'acquiescence' did not cause material prejudice: [53]-[54], [74].

3. Civil procedure: apportionable claims; concurrent wrongdoers

***Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd* [2019] NSWCA 161**

Decision date: 2 July 2019

Bell P, Macfarlan JA, Payne JA

Lindsay and Faith Northcott commenced proceedings in the District Court against Landpower Australia Pty Ltd ('Landpower'), seeking damages for breach of contract, negligence, misleading or deceptive conduct, and negligent misrepresentation. The proceedings concerned the performance of a combine harvester that the Northcotts used in their agricultural cropping business. Landpower denied the allegations, and in the alternative, pleaded that the Northcotts' claims were apportionable claims within the meaning of s 87CB of the *Competition and Consumer Act 2010* (Cth), s 87CB of the *Trade Practices Act 1974* (Cth), and s 35(1) of the *Civil Liability Act 2002* (NSW). In its defence, Landpower identified a number of alleged concurrent wrongdoers, none of which were joined as defendants. Landpower also brought a cross-claim against one of the concurrent wrongdoers identified in the defence, Penske Power Systems Pty Ltd ('Penske'). The cross-claim alleged that if Landpower was liable to the Northcotts, that liability was a result of Penske having breached a contract between it and Landpower, having been negligent in undertaking its work for Landpower, having engaged in misleading or deceptive conduct, and/or having made negligent misrepresentations to Landpower. Penske sought to have the cross-claim dismissed. The primary judge did so summarily.

On appeal, the issue was whether the primary judge erred in summarily dismissing Landpower's cross-claim against Penske. That issue raised questions in relation to the circumstances in which a defendant who raises a proportionate liability defence and names concurrent wrongdoers may still bring cross-claims against such wrongdoers.

Held:

- Appeal allowed: [55]-[57].
- The primary judge erred in dismissing the cross-claim summarily: [38].
- Other than cross-claims for contribution pursuant to s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 87CF of the *Competition and Consumer Act* and s 36 of the *Civil Liability Act* do not necessarily preclude cross-claims against alleged concurrent wrongdoers: [32]-[37], [49].
- That a claim is said to be apportionable does not, of itself, preclude the bringing of a cross-claim against alleged concurrent wrongdoers. The claim may be found not to be relevantly apportionable, the named concurrent wrongdoer(s) may not be found to in fact be concurrent wrongdoers, or the cross-claim may advance independent causes of action. The statutory proportionate liability regimes are not intended to weaken independent substantive rights: [39]-[53].

Other Australian intermediate appellate decisions of interest

4. **Statutory interpretation: interpretation statutes; counting rules**

Waterfront Place Pty Ltd v Minister for Planning & Ors **[2019] VSCA 156**

Decision date: 28 June 2019

Maxwell ACJ, T Forrest JA, Emerton JA

Section 44(3) of the *Interpretation of Legislation Act 1984* (Vic) provides:

> Where the time limited by an Act … for the doing of any act or thing expires or falls on a day that is a holiday, the time so limited shall extend to, and the act or thing may be done on, the day next following that is not a holiday.

'Holiday' is defined to mean a Saturday, Sunday, or public holiday. Section 44(3) applies to the interpretation of all Victorian statutes 'unless a contrary intention' appears in the *Interpretation of Legislation Act* or the Act or subordinate instrument in question.

Clause 58(2) of sch 1 to the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* confers a power on the Minister for Planning to 'call in' a proceeding commenced in the Tribunal. The power is exercised by giving a notice to the Tribunal. Sub-clause 58(3)(b) provides that such a notice 'is of no effect unless it is given … no later than 7 days before the day fixed for the hearing of the proceeding'.

Waterfront Place Pty Ltd ('Waterfront') owned a property in Port Melbourne. It applied to Port Phillip City Council for a planning permit to develop the land. The Council refused the permit application. In September 2017, Waterfront sought review of that decision in Tribunal. On 5 March 2018, the Tribunal ordered that a hearing of the review proceeding commence on Monday 30 July 2018. On Monday 23 July 2018, the Minister wrote to the Principal Registrar of the Tribunal, giving notice of a decision to call in the proceeding. Waterfront commenced proceedings in the Victorian Supreme Court, seeking a declaration that the Minister's notice was invalid, on the basis that the notice had been given less than seven days before the day fixed for hearing. Before the primary judge, Waterfront and the Minister agreed that the last day for giving effective notice under cl 58 was Sunday 22 July 2018. The Minister contended, however, that s 44(3) of the *Interpretation of Legislation Act* applied to extend the time for giving effective notice to Monday. Waterfront argued that the *VCAT Act* disclosed a contrary intention, rendering the extension rule inapplicable. The primary judge dismissed Waterfront's application. Waterfront sought leave to appeal, essentially pressing the same argument.

Held:

- Leave to appeal was refused: [51].
- Interpretation statutes provide the setting in which substantive legislation is enacted. Given that the legislature said nothing in cl 58 to exclude the operation of the extension rule, very strong indicia of an intention to do so would need to be present in the structure, content, and purpose of the *VCAT Act* as a whole or the call in power in particular. There were no such indicia: [36]-[41].

5. **Evidence: legal professional privilege; investigative report**

Douglas v Morgan **[2019] SASCFC 76**

Decision date: 1 July 2019

Kelly J, Blue J, Nicholson J

In December 2012, there was a collision between a car driven by Ms Douglas and a pedestrian, Ms Morgan. Allianz Australia Insurance Limited ('Allianz') was the claims agent for Ms Douglas' compulsory third party insurer. Allianz commissioned Verifact Investigations Pty Ltd (SA) ('Verifact') to produce an investigative report on the collision in order to help Allianz determine its liability. The report was duly produced and delivered to Allianz. In addition to a summary of the inquiries and their outcome, it included four witness statements and 11 photos of the accident scene. Having received the report and other materials, in June 2013, Allianz advised Ms Morgan's solicitors that it had come to the view that Ms Morgan had failed to take reasonable care in crossing the road, had failed to notice Ms Douglas' car, and had crossed the path of her oncoming vehicle.

In November 2015, Ms Morgan commenced personal injury proceedings in the District Court against Ms Douglas. Allianz defended the proceedings. In April 2017, Allianz (by its solicitors) filed a list of documents, and claimed legal professional privilege with respect to the investigative report prepared by Verifact, claiming that it was prepared for the dominant purpose of obtaining legal advice and for use in the legal proceedings on foot.

In November 2017, Ms Morgan filed an interlocutory application, challenging the claim of legal professional privilege, and seeking the production of the investigative report.

A Master heard that application in March 2018, and in April 2018, upheld the claim of privilege. On the basis of documentary evidence alone, the Master considered that the report had been prepared for two purposes – in anticipation of possible litigation, and for use in pre-litigation processes. The Master held that the former was the dominant purpose, and the report was therefore privileged. Ms Morgan appealed, and a Judge of the District Court allowed the appeal, holding that the investigative report was not covered by legal professional privilege. Ms Douglas appealed.

Held:

- Appeal dismissed: [1], [90], [91].
- The Full Court held, contrary to the Master, that when considered in the context of Allianz's request to Verifact, the investigator's report was not produced for the dominant purpose of use in legal proceedings. Rather, the immediate or primary purpose of requesting the report was to enable Allianz to determine its views on its liability. As such, the District Court Judge was right to allow the appeal: [65], [70], [75], [87].

Asia Pacific decisions of interest

6. Insurance: assignment of replacement benefits

Supreme Court of New Zealand/Te Kōti Mana Nui

***Xu v IAG New Zealand Limited* [2019] NZSC 68**

Decision date: 3 July 2019

William Young J, Glazebrook J, O'Regan J, Ellen France J, Arnold J

Natalie Hall-Barlow and Matthew Barlow owned a house in Christchurch which was damaged in the Canterbury earthquakes on 4 September 2010 and 22 February 2011. The house was insured under a policy underwritten by IAG New Zealand Limited ('IAG'), which relevantly provided that:

1. If, following loss or damage you
   (a) restore your Home, we will pay the cost of restoring it to a condition as nearly as possible equal to its condition when new…
   (b) do not restore your Home, we will pay the lesser of (i) the amount of the loss or damage, or (ii) [the] estimated cost of restoring your Home as nearly as possible to the same condition it was in immediately before the loss or damage happened…
2. Where a contract of sale and purchase of your Home has been entered into the purchaser shall be entitled to the benefit of this Section but to get this benefit the purchaser must
   (a) comply with all the Conditions of the Policy, and
   (b) claim under any other insurance that has been arranged before claiming under this Policy.

The Barlows claimed under the policy. After three years, their claim was still unresolved. They transferred the property to a company they controlled, and then sold the property to the appellants, assigning to the appellants their rights under the policy. It was common ground that the appellants were entitled to an indemnity under cl 1(b). The question in these proceedings was whether the appellants would be entitled to replacement costs under cl 1(a) if they were to restore the house. IAG contended that, in circumstances where the Barlows had not commenced restoration, the right under cl 1(a) was not assignable so as to enable the appellants to restore the property and be reimbursed by IAG for the restoration costs. IAG relied on the Court of Appeal's earlier decision of *Bryant v Primary Industries Insurance Co Ltd* [1990] 2 NZLR 142 as authority for this contention. A Judge of the High Court considered himself bound by *Bryant*, and interpreted condition 2 as applying only to situations where the insured event occurred between entering into an unconditional contract for the sale of the insured property and settlement. The Court of Appeal took a similar view, dismissing the appellants' appeal. They appealed again to the Supreme Court.

Held:

- By majority, appeal dismissed (Glazebrook and Arnold JJ dissenting): [58].
- The majority applied *Bryant*, insofar as it stands for the proposition that 'the entitlement to replacement benefits conditional upon reinstatement by the insured cannot be assigned where no such reinstatement has occurred'. The majority also substantially agreed with the lower courts' construction of cl 2: [45], [54].

Other international decisions of interest

7. Constitutional law: Fourth Amendment; warrantless searches

Supreme Court of the United States

***Mitchell v Wisconsin* 588 U.S. ___ (2019)**

Decision date: 27 June 2019

Roberts CJ, Thomas J, Ginsburg J, Breyer J, Alito J, Sotomayor J, Kagan J, Gorsuch J, Kavanaugh J

A police officer in Wisconsin administered a breath test to Mr George Mitchell. The test returned a result of a blood alcohol concentration level of 0.24% – triple the limit that Wisconsin law prescribes for driving. The officer arrested Mr Mitchell for operating a vehicle while intoxicated. Mr Mitchell's condition deteriorated such that the officer decided to drive him to a hospital for a blood test. On the way to the hospital, Mr Mitchell lost consciousness. Upon arrival, the officer read to Mr Mitchell a standard statement that invites drivers to refuse a blood test. Still unconscious, Mr Mitchell did not respond. Without a warrant, blood was drawn from him, and analysis showed that his blood alcohol concentration level was 0.222%, roughly 90 minutes after the time of his arrest. Mr Mitchell was charged with two drunk-driving offences. At trial, he sought to have the results of the blood test suppressed on the basis that a warrantless test violated his Fourth Amendment right 'against unreasonable searches'. The State of Wisconsin relied on its 'implied consent' statute as an answer to the Fourth Amendment concerns. That statute provides that a driver is deemed to have consented to breath or blood tests if an officer has reason to believe they have committed a drug- or alcohol-related offence. The statute provides that a 'person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have' withdrawn it. At trial, Mr Mitchell's motion to suppress was denied, and a jury found him guilty. The Wisconsin Supreme Court affirmed his convictions. The question for the Supreme Court of the United States was '[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.'

Held:

- The plurality held that where a driver is unconscious, the exigency of the circumstances is such that it will almost always be permissible for a blood test to be taken without a warrant. The case was remanded to allow Mr Mitchell to put the argument that the officer in fact had time to seek a warrant (and so exigent circumstances did not obtain): Opinion of the Court, 1-2, 16-17.
- Sotomayor J dissented (joined by Ginsburg and Kagan JJ), reasoning that the plurality had not answered the question put to the Court, and had reasoned contrary to Wisconsin's concession that this was not an exigency case. In her view, the implied consent statute does not reach the high bar required by the Fourth Amendment for warrantless searches – namely, actual and informed consent: Sotomayor J at 1-3, 7.
- Thomas J concurred with the plurality's orders, though not their reasons. Gorsuch J considered the case an inappropriate vehicle to determine the question put.

8. **Contracts: employment; restraint of trade; shareholding; severance**

Supreme Court of the United Kingdom

Tillman v Egon Zehnder Ltd **[2019] UKSC 32**

Decision date: 3 July 2019

Lady Hale (President), Lord Kerr, Lord Wilson, Lord Briggs, Lady Arden

In 2003, Ms Tillman began working in the financial services practice area of Egon Zehnder Ltd ('EZL'), an executive search and recruitment company. Over time, she was promoted, and in 2012, became the joint global practice head. Clause 13.2.3 of her employment contract contained a restraint on Ms Tillman's activities in the period of six months after the termination of her contract. By that clause, Ms Tillman agreed that she would not 'directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of [EZL]' in a 12 month period prior to the termination date 'and with which [she was] materially concerned during such period'. Ms Tillman's employment with EZL ended on 30 January 2017. Shortly afterwards, she informed EZL that she intended to begin working for a competitor firm within the restricted six-month period. She contended that cl 13.2.3 was an unreasonable restraint of trade, and was therefore void. EZL commenced proceedings in April 2017, seeking an interim injunction restraining Ms Tillman from entering into the proposed employment. The enforceability of cl 13.2.3 turned on whether the words 'interested in' prevented Ms Tillman from being a minority shareholder in a rival company; if so, whether such restriction was unreasonable; and if so, whether those words were severable. The High Court held that the words 'interested in' did not prevent a minority shareholding, reached no final view on severance, and issued the injunction sought. The Court of Appeal set aside that injunction, holding that the words did prevent a minority shareholding, refusing to sever them, and thus holding that cl 13.2.3 was void as an unreasonable restraint of trade. EZL appealed. In the Supreme Court, the key issues were: (i) assuming that cl 13.2.3 captures shareholding, does that part of the covenant come within the restraint of trade doctrine?; (ii) do the words 'interested in', properly construed, prohibit any shareholding?; and (iii) if they do, what would the correct approach to severance be?

Held:

- Appeal allowed; though the restraint period had expired, the injunction was formally reinstated: [91].
- On (i): without deciding the bounds of the restraint of trade doctrine, the Court held that in substance and form, a restraint on shareholding was part of the restraint on Ms Tillman's employment after working for EZL, and so the doctrine applied: [33]-[34].
- On (ii): properly construed, the words 'interested in' included shareholding. The restraint imposed by those words was therefore unreasonable: [52]-[53].
- On (iii): it was possible to sever the words 'or interested' from cl 13.2.3 without needing to amend the rest of the clause, and doing so would not lead to any major change in the overall effect of the restraints: [88].