



Court of Appeal  
Supreme Court  
Sydney

## Decisions of interest

7 December 2019 – 24 December 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. **Trade Practices: misleading or deceptive conduct; damages**

### ***Ireland v WG Riverview Pty Ltd* [\[2019\] NSWCA 307](#)**

**Decision date:** 20 December 2019

Bell ACJ; Macfarlan JA; Barrett AJA

WG Riverview Pty Ltd (the Respondent) purchased an Angus bull (the Bull) at an auction conducted by Mr and Mrs Ireland (the Appellants) for \$28,000. The Bull was identified in the auction catalogue as being sired by a particular stud bull. The catalogue also contained a disclaimer excluding responsibility for the correctness, use or interpretation of the information contained within it.

Following the purchase of the Bull, DNA testing was undertaken which determined that the Bull was not sired as advertised. Therefore, the Respondent could not register the Bull as a stud bull on the Angus Society of Australia's registers, considerably lowering the value of the Bull.

In the District Court, the Respondent claimed that the Appellants' representation as to the Bull's sire was misleading or deceptive, and claimed damages as compensation for the loss in purchasing the Bull in reliance upon that representation. Notwithstanding that the Court found that the Appellants had an honest belief in the representation made, the Respondent's claim was upheld and damages of \$200,191.88 were awarded for the difference between the sum paid for the Bull and its commercial value and for certain of the stud bull's progeny; and marginal costs related to breeding and sale of stud cattle as compared to commercial cattle.

The issues on appeal included the proper characterisation of the representation and whether it was as to fact or honestly held belief and whether the primary judge failed to consider the conduct of the Appellants as a whole when considering whether their conduct had been misleading or deceptive; and whether the primary judge erroneously assessed damages by awarding the Respondent its expectation loss.

#### **Held:**

- Appeal allowed: [43], [90].
- The Appellants did not represent, as a matter of certain fact, the Bull's sire and therefore their conduct did not constitute misleading or deceptive conduct: [74].
- Damages for expectation loss are not usually awarded for contravention of the statutory misleading and deceptive conduct provisions: [83]; and the evidence was lacking to support an award on this basis: [84].

## 2. Torts: Malicious Prosecution

### ***Wood v State of New South Wales*** [\[2019\] NSWCA 313](#)

**Decision date:** 20 December 2019

Gleeson JA; Payne JA; Simpson AJA

Mr Gordon Wood (the Appellant) was convicted of the murder of Ms Caroline Byrne in 2008. The Crown Prosecutor in the Appellant's criminal trial was Mr Mark Tedeschi QC. The Appellant was acquitted by the Court of Criminal Appeal in 2012. This judgment included findings critical of the conduct of Mr Tedeschi as Crown Prosecutor amounting to prosecutorial misconduct.

The Appellant commenced proceedings in the Supreme Court against the State of New South Wales in 2014 claiming damages for the torts of malicious prosecution and false imprisonment; an alleged abuse of process; and misfeasance in public office in relation to the decision to initiate and maintain the prosecution of the Appellant for Ms Byrne's murder.

The primary judge concluded that the prosecution was initiated and maintained without reasonable and probable cause, but dismissed the Appellant's claims as malice had not been established. The Appellant brought proceedings challenging this decision relying upon conduct such as Mr Tedeschi's failure to make an informed assessment of the credibility and reliability of an expert witness, A/Prof Cross; and "50 Questions" put to the jury by Mr Tedeschi.

The issue on appeal was whether the primary judge erred in failing to find that the State acted with malice in the initiation and maintenance of the prosecution of the Appellant for the murder of Ms Byrne. There were only limited challenges to the primary findings of fact made by the primary judge.

#### **Held:**

- Appeal dismissed: [105].
- The adverse findings her Honour had made in relation to Mr Tedeschi acting inconsistently with his legal and ethical obligations as a Crown Prosecutor and the lack of reasonable and probable cause *did not* dictate a finding of malice: [62].
- No error was shown in the approach or conclusions of the primary judge, particularly in relation to her Honour's assessment of Mr Tedeschi's presentation as a witness: [61]-[64], [76]-[77], [89], [96], [103].
- The evidence given by Mr Tedeschi relevant to malice was not so obviously untenable that it must be rejected: [91], [97], [99]-[100], [104].

### 3. **Civil Procedure: stay of proceedings; limitation of actions**

#### ***The Council of Trinity Grammar School v Anderson* [\[2019\] NSWCA 292](#)**

**Decision date:** 9 December 2019

Bathurst CJ; Payne JA; Simpson AJA

Robert Anderson (the Respondent) attended Trinity Preparatory School (the School). In 1997 the Respondent complained to police that he had been sexually assaulted by a teacher of the School, Mr Futcher, between 1974 and 1976 whilst a student at the School, including when Mr Futcher was the supervising teacher at school camp. Mr Futcher was convicted of committing acts of indecency and buggery against the Respondent and others and was sentenced to a term of imprisonment of 18 years and 4 months. At the time of the assaults, Mr Wilson-Hogg was the Headmaster of the High School and Reverend Sandars was the Master in Charge of the Preparatory School.

The Respondent's solicitors foreshadowed a claim against the Council of Trinity Grammar School (the Applicant) on his behalf in 2004, indicating an intention to institute proceedings claiming damages on the basis that the Applicant was liable for these assaults as it owed a non-delegable duty of care to ensure reasonable care was taken for the Respondent's safety. No claim was made at that time. In 2016, s 6A of the *Limitation Act 1969* (NSW) abolished the time bar for such proceedings and proceedings were instituted by the Respondent.

In 2018, the Applicant sought an order that the proceedings instituted by the Respondent be permanently stayed. Relevant to this were the effluxion of time since the alleged offences occurred and the deaths of key witnesses Mr Wilson-Hogg and Rev Sandars. The primary judge dismissed the motion and the Applicant sought leave to appeal from that decision. The primary issue on appeal was whether the primary judge erred in the exercise of his discretion to refuse a permanent stay of the proceedings and therefore whether the discretion should be re-exercised.

#### **Held:**

- Leave to appeal granted and appeal allowed. The Applicant was unable to deal meaningfully with the claim and a continuation of the proceedings would have been unfairly oppressive and burdensome: [506]. Orders of the primary judge were set aside and proceedings permanently stayed: [506], [507].
- The Applicant's inquiries into the allegations were reasonable and it was not responsible for the position it found itself in in being unable meaningfully to deal with the proceedings. It was not unreasonable for the Applicant to adopt the position in 2004 that the claim was statute-barred and not investigate its merits: [503]. It was not necessary to pursue any line of inquiry however remote which may produce some information which may be of assistance in dealing with the issue: [489]-[490], [505].

#### 4. **Worker's Compensation: entitlement to lump sum compensation**

##### ***Secretary, New South Wales Department of Education v Johnson* [\[2019\] NSWCA 321](#)**

**Decision date:** 20 December 2019

Macfarlan JA; Emmett AJA; Simpson AJA

Ms Elaine Johnson (the Respondent) sustained a psychological injury during the course of her employment by the NSW Department of Education (the First Injury). She subsequently sustained a psychological injury in the course of secondary employment (the Second Injury).

The Respondent claimed lump sum compensation from the Secretary of the NSW Department of Education (the Applicant) based on her impairment resulting from the First Injury. Two assessments of the Respondent's percentage whole person impairment (WPI) were undertaken, certifying her WPI was 19% in 2017 and 17% in 2018, which would entitle the Respondent to lump sum compensation. The Applicant appealed to the Appeal Panel of the Workers Compensation Commission of NSW (WCC). A new assessment was conducted, reducing the WPI to 6%, which would not entitle her to lump sum compensation.

The Respondent sought orders for this decision to be quashed. The primary judge quashed the decision of the Appeal Panel on the basis that the assessment contained an error of law on its face, and remitted the matter to the Registrar of the WCC to be determined according to law.

The Applicant sought leave to appeal. The issues on appeal were whether, in the case of subsequent injury, common law principles relating to causation apply to such assessments in relation to the earlier injury; and whether the Appeal Panel was required to determine that the entirety of the WPI was the result of the First Injury, without allowing for apportionment for the Second Injury.

##### **Held:**

- Leave to appeal granted and appeal dismissed, and the matter be remitted for consideration by the Appeal Panel: [78]-[79], [139].
- The Appeal Panel erred in failing properly to inquire as to whether, by reason of the First Injury, the Second Injury was more serious than it would have been had the First Injury not occurred: [76], [146]. This failure to address a case advanced on behalf of a party was a constructive failure to exercise jurisdiction and constituted jurisdictional error: [137]-[139].
- There is no difference between the legal view of causation in tort and in workers compensation, except that the element of foreseeability is not required for a workers compensation injury: [53].

## 5. **Administrative Law: judicial review**

### ***Director of Public Prosecutions (NSW) v Hamzy* [\[2019\] NSWCA 314](#)**

**Decision date:** 19 December 2019

Gleeson JA; Payne JA; Brereton JA

Following an incident at the Goulburn Correctional Centre in 2017, Mr Bassam Hamzy (the Respondent) was subjected to internal disciplinary action in the form of reductions in certain privileges pursuant to a Behaviour Management Plan. The Respondent was subsequently charged with assaulting a law enforcement officer while in the execution of the officer's duties in relation to this incident.

The Respondent was convicted and sentenced in the Local Court, and his appeal against conviction and sentence to the District Court was allowed and a permanent stay was ordered. The primary judge held that the prosecution would bring the administration of justice into disrepute because it would undermine the community's confidence in the administration of justice within the correctional system; and that the criminal proceedings were oppressive as the Behaviour Management Plan was an attempt to subvert the proper legislative and regulatory penalty regimes.

The Director of Public Prosecutions sought judicial review of this decision, claiming that the District Court misapprehended the nature and scope of its jurisdiction to stay proceedings by relying on circumstances said to give rise to an abuse of process which did not have some effect on the relevant proceedings; addressing itself to the wrong issue, namely public confidence in the administration of justice *within the Correctional system*; having regard to an irrelevant consideration, being the Behaviour Management Plan; and erroneously giving weight to the notion of double jeopardy. The issue on appeal was whether the decision of the District Court on appeal from the Local Court was affected by jurisdictional error.

#### **Held:**

- The orders of the District Court were set aside, and the matter remitted to the District Court to determine the appeal according to law: [96]-[97].
- The power of the Local Court, and the District Court exercising criminal appellate jurisdiction, to stay criminal proceedings as an abuse of process is a power to protect the integrity of its own processes: [51], whereas the primary judge had conflated public confidence in the administration of justice within the Correctional system with justice in this case, thereby addressing the wrong issue and exceeding jurisdiction: [52]-[54].
- As the proper legislative penalty regime was not engaged, the criminal proceedings did not breach the rule of double jeopardy as no plea of *autrefois acquit* or *autrefois convict* was available: [77]-[79].

## Other Australian intermediate appellate decision of interest

### 6. **Torts: negligence; duty of care**

***The Age Company Limited v YZ (a pseudonym)*** [\[2019\] VSCA 313](#)

**Decision date:** 19 December 2019

Niall JA; T Forrest JA; Emerton JA

YZ (the Respondent) developed Post-Traumatic Stress Disorder during the course of her employment with The Age (the Applicant) as a result of being exposed to traumatic events in the course of her work. The Respondent was employed as a journalist working on crime reporting, including attending the scenes of and reporting on more than 30 murders. There was a period in 2009 in which she was moved to sports reporting, during which her symptoms were alleviated. She was then moved to court reporting in 2010 against her wishes, where she reported on a significant number of murder trials, experienced deterioration in her symptoms and made numerous complaints to her employer.

The Respondent commenced proceedings against the Applicant in 2016, claiming that the Applicant had committed negligence by breaching its duty of care towards her by failing to put in place measures to identify and avoid psychological injury. The County Court upheld the Respondent's claim and awarded general damages of \$180,000. The Applicant sought leave to appeal against the finding on liability.

The issue on appeal was whether the primary judge correctly formulated the elements required of the duty of care; and whether the findings on causation could be sustained on the evidence.

#### **Held:**

- Leave to appeal granted and appeal allowed in part: [11], [212].
- The finding of the primary judge that the Applicant breached its duty of care from 2010 was upheld, following the Respondent's transfer to court reporting and the manifestation of her symptoms and complaints at work: [208]-[210]. Additional training and a formal peer support program would have supported the Applicant in avoiding her transfer to court reporting: [201].
- The finding of the primary judge that the Applicant breached its duty of care prior to 2009, while the Respondent was in crime reporting, was overturned, as the identified measures would not have prevented the transfer: [11], [205].
- The order for damages was set aside and the matter remitted to the trial judge for re-assessment: [12], [209]-[212].

## Asia Pacific decision of interest

### 7. Human Rights: enforcement of breaches

*Asuma (trading as Andy Asuma Trading) v Tiong Juk Chuong* [\[2019\] PGSC 124](#)

**Decision date:** 18 December 2019

Hartshorn J; Makail J; Bona J

A police-led operation targeting Andy Asuma (First Appellants)'s business premises occurred after allegations that it was the site of an illicit trade in alcohol and drugs. The First Appellant was arrested and removed, and his premises were destroyed. John Molu and others (Second Appellants) were unlawfully assaulted and detained at the behest and support of Wawoi Guavi Timber Company Ltd (Third Respondent).

The Appellants commenced proceedings in the National Court of Papua New Guinea and claimed damages for breaches of human rights under the Constitution in relation to these events. This included the right to liberty; freedom from arbitrary search and entry; protection from unjust deprivation of property; freedom from inhuman treatment; and the full protection of the law. The Appellants alleged that the First to Third Respondents were vicariously liable for these breaches committed against them by the members of the police forces led by Senior Sergeant Biamaga (Fourth Respondent). The National Court held that the Appellants had proved the majority of the allegations, but had failed to prove that the Respondents were liable for these breaches.

The Appellants brought an appeal against this decision in the Supreme Court of Papua New Guinea. The issue on appeal was whether there was sufficient evidence to prove that the Third Respondent was vicariously liable for the act/omissions of the remaining Respondents.

#### **Held:**

- Appeal dismissed: [26], [27].
- The trial judge did not make identifiable errors in his assessment and treatment of the evidence to justify appellate interference, in light of the better position of a trial judge to form a view on the credibility of evidence. Nor did the trial judge give weight to extraneous or irrelevant matters nor fail to give weight or sufficient weight to relevant considerations: [22].
- The police operation was internally authorised by the police as opposed to the Third Respondent requesting or authorising the police to conduct the operation. It was not proved that the remaining Respondents were the servants or agents of the Third Respondent: [23]-[24].



## Other international decision of interest

### 8. Tax: charitable tax credits

***Commissioner of Inland Revenue v Nancy Lois Roberts*** [\[2019\] NZCA 654](#)

**Decision date:** 17 December 2019

Clifford J; Goddard J; Stevens J

Mrs Roberts (the Respondent) and her late husband established a registered charity, to which they lent over \$1.7 million in 2008. During the 2011 to 2015 income tax years, the Respondent forgave \$274,732 of this loan, through the execution of deeds of gift. Subsequently, the Respondent claimed charitable tax credits in relation to these gifts. The total tax credits amounted to \$91,577.24, and the Respondent received payment from the Commissioner of Inland Revenue (the Appellant) of the donations tax credits.

Following a risk review, the Appellant reversed the tax credits for the five years and required repayment by the Respondent of the previously paid tax credits. Following a disputes process, the Commissioner's Disputes Review Unit confirmed the Commissioner's decision. The Respondent successfully challenged that ruling in the High Court, where it was held that the gifts, in the form of forgiveness of debts, were monetary gifts for the purpose of the legislation. The Appellant appealed this decision.

The issue on appeal was whether forgiveness of a debt qualifies as a "charitable or other public benefit gift" under New Zealand tax legislation, thereby entitling the donor to a tax credit, as the term "monetary" in the phrase "monetary gift" is not defined in the legislation. The Appellant argued that the release of an obligation to repay money is not a gift of money; and that Parliament's purpose was that the gift must involve a transfer of money from the donor to the donee.

**Held:**

- Appeal dismissed: [67].
- Applying statutory interpretation principles, the words monetary and money as defined in the legislation are not limited to cash payments: [40], [62].
- The policy reasons advanced by the Appellant, being avoidance of significant costs and the difficulty of valuing non-cash donations, were not sufficiently compelling to warrant a requirement for donations to be in cash: [55], [63]-[66].