Court of Appeal
Supreme Court
Sydney

Decisions of Interest

15 February 2021 – 28 February 2021

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

Administrative Law: judicial review; *Motor Accidents Compensation Act 1999*

***AAI Ltd t/as AAMI v Chan* [2021] NSWCA 19**

Decision date: 25 February 2021

Gleeson and Leeming JJA, Emmett AJA

Dr Chan was injured in a motor vehicle accident in 2014. In 2019 a medical assessor certified that he had suffered injury to his cervical spine amounting to 5% whole person impairment, but concluded that there was insufficient evidence to suggest that the accident had caused any injury to his right shoulder. This view was confirmed by a medical review panel. Dr Chan subsequently obtained two medical expert reports opining that the accident had caused injury to his right shoulder. On the basis of these reports, Dr Chan applied for a further medical assessment. Section 62(1A) of the *Motor Accidents Compensation Act 1999* (NSW) only permits such referrals where the additional information relied on is "capable of having a material effect on the outcome of the previous assessment". The officer who considered the application determined that the reports provided did not meet that standard, on the basis that the relevant information and reasoning had already been considered and rejected by the review panel. Dr Chan sought judicial review of the decision, alleging jurisdictional error and "error on the face of the record". The primary judge found that the officer had posed the wrong question or improperly limited the scope of her inquiry. The insurer (AAMI) appealed.

Held: Allowing the appeal and reinstating the officer's initial decision

- Where an appeal is alleged to lie as of right under s 101(2)(r) of the *Supreme Court Act 1970* (NSW) the onus is on the appellant to establish the relevant facts by way of evidence: [61].
- The prohibition in s 62(1A) turns on the officer's opinion as to the capacity of additional information to have a material effect on the outcome of the assessment, despite the absence of any reference to the officer's opinion or satisfaction: [20]-[23], [104]. This opinion does not involve a prediction that additional information *would* change the outcome of the assessment [24]-[26].
- The issue on an application for judicial review is not the correctness of the opinion but whether it was properly formed according to law: [27]-[28], [68]. To simply allege 'error on the face of the record', as opposed to an error of law, by asserting that the opinion is wrong, is insufficient: [47]. Moreover, error of law on the face of the record is not to be conflated with jurisdictional error: [42]-[46].
- Whether the additional information was capable of having a material effect on the outcome of an assessment was a question of fact: [70]. The reasons of the officer are not to be construed minutely or finely as though they were the reasons of a court: [29], [74].The primary judge failed to identify any error of law, and no such error is evident in the officer's reasoning: [77]-[78], [106].

Interpretation: development consent

***Settlers Estate Pty Ltd v Penrith City Council* [2021] NSWCA 13**

Decision date: 23 February 2021

Gleeson and Payne JJA, Preston CJ of LEC

Settlers Estate Pty Ltd ('the developer') had received development consents for construction works including the construction of a drainage line. The development consent plan showed the discharge point of the drainage line as located in a "riparian corridor", but did not fix the location by reference to any surveyed point or topographical feature. Construction certificates later issued for the drainage works included plans showing the discharge point by reference to a topographical feature, being to the east of an existing channel. The parameters given for the drainage line in the construction certificate plan were internally inconsistent, such that it may not have been possible to construct a drainage line with the height, length, grade and direction shown that discharged at the point shown. The drainage channel as constructed crossed the existing channel to discharge into a newly formed drainage line to the west of it in the riparian corridor. Penrith City Council brought proceedings in the Land and Environment Court alleging that the drainage line, in breach of s 4.2 of the *Environmental Planning and Assessment Act 1979* (NSW) ('EP&A Act'), had not been constructed in accordance with the development consent. The primary judge found against the developer. The developer applied for leave to appeal to the Court of Appeal in relation to the substantive findings of the primary judge and in relation to the refusal of leave to reopen to lead additional evidence concerning how the drainage line came to be built where it was.

Held: dismissing the summons seeking leave to appeal

- The effect of the construction certificate plans, in accordance with s 4.16(12) of the EP&A Act, was to amend the development consent, and to the extent of any inconsistency the construction certificate plans prevail: [16].
- The discharge point of the drainage line was a fundamental aspect of the construction certificate plans and not merely indicative. It served a functional purpose by directing water to the existing channel: [42]-[44]. It is irrelevant to the question of breach of s 4.2 of the EP&A Act that it might be impossible to comply with all of the parameters in the development consent: [45].
- The primary judge correctly refused to determine for herself, by a comparison of plans or use of a protractor, that the drainage line was constructed in the direction shown on the construction certificate plan. The angle of the drainage line was not a fact of which judicial notice could be taken, and evidence should have been led to establish it: [61]-[62].
- No injustice was caused by the primary judge's refusal of leave to reopen, as the explanation for how the drainage line may have come to be constructed in the wrong location was legally irrelevant to the question of breach of s 4.2 of the EP&A Act: [86]-[87].

Evidence: standard of proof; *Jones v Dunkel* inference

***Musa v Alzreaiawi* [2021] NSWCA 12**

Decision date: 19 February 2021

Bell P, Macfarlan and Gleeson JJA

Following their separation in 1998, Mr Musa and Ms Alzreaiawi purchased a property as joint tenants in 1999 with the intention of providing a home for their three children. A transfer of the property to Ms Alzreaiawi was registered in 2011, and the property was later sold by Ms Alzreaiawi in 2017. Mr Musa challenged the validity of the 2011 transfer, alleging that his signature on the transfer documents had been forged and that Ms Musa was a party to that fraud. The witness attesting to the signature on the transfer documents was not called by either party. The evidence of a handwriting expert concerning the signature was inconclusive. The primary judge found that Mr Musa had failed to discharge the onus of proof that his signature on the transfer documents was a forgery and that Ms Alzreaiawi was a party to that fraud. Mr Musa appealed, arguing that the primary judge had erred with respect to the onus of proof, and seeking to argue for the first time that the primary judge ought to have drawn a *Jones v Dunkel* inference against Ms Alzreaiawi for failing to call the witness to the transfer form.

Held: dismissing the appeal

- With respect to the standard of proof required to establish the fraud exception to indefeasibility under the *Real Property Act 1900* (NSW), the relevant principles are those in *Briginshaw v Briginshaw* (1938) 60 CLR 336. This requires the nature and subject matter of proceedings and the gravity of matters alleged to be taken into account, reflecting the perception that members of the community do not ordinarily engage in serious misconduct: [33], [40]-[42].

- Reliance on statements in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, concerning situations where there is a choice between competing and mutually inconsistent allegations of fraudulent conduct, was misplaced in this case where the only question was whether a particular signature was fraudulent: [45]-[48] There was no basis for extending the *Neat Holdings* principle to the present case: [50]. The primary judge was not wrong to require ‘actual persuasion’ on the balance of probabilities, which should be understood as equivalent to the state of ‘satisfaction’ required by s 140 of the *Evidence Act 1995* (NSW): [50].

- The absence of any adverse credit finding concerning Mr Musa’s denials did not mean that there was no room for the primary judge to conclude otherwise than that he did not sign the transfer: [58]-[59].

- The *Jones v Dunkel* argument was not advanced at trial. Had it been raised at trial, it would have been open to Ms Alzreaiawi to advance arguments as to why the witness in question had not been called or would not be expected to be called: [83]. Refusal to allow a new point to be taken on appeal is supported by important considerations of principle: [85]-[88].

Defamation: defences; defence of contextual truth

***Hutley v Cosco* [2021] NSWCA 17**

Decision date: 23 February 2012

Basten, Macfarlan and White JJA

Ms Hutley and Mr Cosco are neighbours. A dispute arose between them concerning building works being undertaken by Mr Cosco on his property, resulting in an escalating series of incidents. In 2016 Ms Hutley gave an interview describing elements of Mr Cosco's conduct, which was broadcast on television. Mr Cosco brought proceedings against Ms Hutley alleging five defamatory imputations arising from the interview, including that he had endangered the lives of her and her family, and bullied, harassed and physically threatened her. Ms Hutley relied on the defences of substantial truth in s 25 of the *Defamation Act 2005* (NSW) ('the Act') and contextual truth in s 26 of the Act. Section 26 of the Act makes it a defence to the publication of a defamatory matter if the defendant can show that the defamatory matter carried other, contextual imputations (i) that are substantially true and (ii) in the context of which the defamatory imputations pleaded by the plaintiff do not cause further harm to the plaintiff's reputation. The primary judge found in favour of Mr Cosco, rejecting both defences on the basis of factual findings that neither the alleged defamatory imputations nor the contextual imputations relied upon by the defendant were substantially true. Ms Hutley appealed.

Held: Allowing the appeal

- Four out of five of Mr Cosco's alleged defamatory imputations were substantially true: [48], [52], [65], [68], [70], 72]. The fifth imputation was only partially true, requiring consideration of the alternative defence of contextual truth: [92]-[93].

- Five of the six contextual imputations relied on by Ms Hutley were found to have been conveyed and substantially true: [94], [96], [105], [108], [117], [122]. Determining, for the purposes of s 26(b), whether an alleged defamatory imputation causes further harm in the context of other true contextual imputations involves a weighing exercise: [125]. The precise nature of this exercise is unsettled: [126]. The language of s 26 prevents the 'pleading back' of a plaintiff's alleged defamatory imputations shown to be substantially true: [127], [135]-[136]. Moreover, it would make no sense, on a purposive interpretation of the provision, to allow alleged defamatory imputations shown to be substantially true to be placed in the plaintiff's side of the scales: [130]. The result is that alleged defamatory imputations shown to be substantially true are to be disregarded for the purposes of s 26: [131], [142], [146].

- There is nonetheless principle and logic behind recognising, for the purposes of the weighing exercise, that the plaintiff's alleged defamatory imputations shown to be substantially true have already lowered the plaintiff's reputation: [142]. Amendments to the Act, contained in the *Defamation Amendment Act 2020* (NSW), will soon come into effect reflecting this principle: [145].

Australian Intermediate Appellate Decisions of Interest

Contracts; general principles; statutory interpretation

Cheshire v Jennings **[2021] SASCFC 11**

Decision date: 19 February 2021

Peek, Doyle and Livesey JJ

The Appellants purchased a property at auction in 2018, executed the contract, and were given a completed Form 1 pursuant to the *Land and Business (Sale and Conveyancing) Act 1994* (SA). Question 2(5) on the Form 1 asks "Is the vendor aware of an environmental assessment of the land or part of the land ever having been carried out or commenced (whether or not completed)?". The Respondents had answered question 2(5) in the negative. The Appellants refused to settle when they became aware of an investigation conducted by the Department of Defence concerning PFAS contamination at a nearby Airforce base. The investigation had been the subject of a wide-ranging public information campaign. The property was located on the south-western boundary of the base, within the declared "investigation area". The Appellants sought an order that they be allowed to avoid the contract and have their deposit returned. The trial judge dismissed their claim, finding that the Respondents' had answered question 2(5) correctly, despite their awareness of the investigation. The Appellants appealed to the Full Court.

Held: Allowing the appeal

- It was open to the trial judge, without making any adverse credit or reliability findings, to find that the Respondents were aware of the investigation: [41]. It was unnecessary to consider constructive or imputed knowledge: [80]. Awareness as actual knowledge was accepted as requiring a person to be on notice of some matter, but once acquired that awareness would remain: [47].

- The legislative purpose which the Form 1 serves is the provision of accurate information necessary for prospective purchasers to make an informed decision: [54], [56]. The term "environmental assessment" used in the Form 1 is correspondingly broad: [62]. It should be understood as an umbrella term, potentially encompassing myriad investigations and activities that have the goal of ascertaining the existence of site contamination: [69].

- The requirement that an assessment be "of the land or part of the land" does not confine relevant assessments for the purposes of question 2(5) to those related only to that land or involving testing undertaken on that land specifically: [70]. The reference, in the definition of "environmental assessment", to assessments "in relation to water on or below the surface of the land" suggests the possibility of broader assessments: [72] Reference to contamination "at the land" and to reports of assessments "in relation to the land or part of the land" also support this reading: [73], [75]. The burden imposed on a vendor is not unduly onerous, as it is still limited to assessments of which the vendor is aware: [77].

Workers compensation: statutory interpretation; beneficial construction

Coad v Tasmania **[2021] TASFC 2**

Decision date: 17 February 2021

Wood and Geason JJ, Martin AJ

Dennis Coad was assaulted in the course of his employment in 2007, suffering injury to his cervical spine and post-traumatic stress disorder (PTSD). In 2017 he sought a determination of his entitlement to lump sum compensation under the *Workers Rehabilitation and Compensation Act 1988* (Tas) ('the Act'). Section 71(1)(a) provided that "a worker who suffers permanent impairment assessed at a percentage of the whole person of less than 5% is not entitled to compensation under this section". Section 71(2)(a) established in equivalent terms a threshold of 10% for psychiatric impairment. Section 72(2) provided for the combined assessment of impairments arising out of the same incident. Mr Coad's physical impairment was assessed at 5%, and his psychiatric impairment at 6%. The Chief Commissioner of the Workers Rehabilitation and Compensation Tribunal held that Mr Coad was only entitled to lump sum compensation in respect of the injury to his cervical spine, as his PTSD failed to meet the 10% threshold for psychiatric impairment. Mr Coad appealed.

Held: Allowing the appeal

- The word "injury" in s 71(1) includes psychiatric injury: [20]. This is supported by the use of the word in s 72(2) that clearly refers to both physical and psychiatric injury: [23]. No significance attaches to the absence of the words "resulting from an injury" in s 71(2), which must be implied in the section: [29]. The application of the principle *generalia specialibus non derogant* leads to the conclusion that where the impairment is a psychiatric impairment subs (2) alone applies, leaving subs (1) with no application: [32]-[33]. It cannot be said that subs (2) is limited to situations where the only impairment is a psychiatric impairment: [34]. However, ss 71(1) and (2) are silent as to the potential combination of physical and psychiatric impairments: [42].
- The ordinary and natural meaning of s 72(2) allows for psychiatric and physical impairments to be combined: [45]. Once either threshold in s 71 is met, the provision in s 72 for a combination of impairments is limited only by the requirement that they arise out of the same incident: [46], [56]. Whilst there is genuine ambiguity in the provisions, it may be expected that if the legislature intended that in combining psychiatric and physical impairments the respective thresholds must be met for each kind of impairment, this would have been made clear. Beneficial legislation should be construed, in this case, in favour of the worker: [53]. The Appellant was entitled to lump sum compensation in respect of both impairments because he has met the 5% threshold for physical impairment and may combine that impairment with psychiatric impairment by reason of s 72(2), yielding a total impairment of 11%: [61].

Asia Pacific Decision of Interest

Torts: invasion of privacy

***Hyndman v Walker* [2021] NZCA 25**

Decision date: 23 February 2021

Miller, Clifford and Collins JJ

Mr Walker was the liquidator of a series of companies owned by a friend of Mr Hyndman. In his role as liquidator he acquired a number of items seized from the company owner, containing documents of a private nature. Mr Walker distributed, indirectly, to a Mr Holden a draft email prepared for Mr Hyndman in response to an abusive email from Mr Holden. Mr Holden had no interest in the companies or the liquidation, but harboured an intense dislike for Mr Hyndman, whom he harassed to the point that Mr Hyndman succeeded in securing a restraining order against him. Mr Hyndman brought a tort claim for breach of privacy. The primary judge found that, while Mr Hyndman had a reasonable expectation of privacy in the email, the disclosure in question would not be considered highly offensive to an objectively reasonable person. Mr Hyndman appealed to the New Zealand Court of Appeal, arguing that the Court should depart from its decision in *Hosking v Runting* [2005] 1 NZLR 1 ('*Hosking*') by removing the "highly offensive" limb of the tort.

Held: Dismissing the appeal

- The tort of invasion of privacy is founded on inherent dignity and personal autonomy, and acts as a constraint on others' right to freedom of expression: [31]. The "highly offensive" limb was carried over from the US formulation of the tort via the judgment of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199: [33]. UK authority, however, has cast doubt on the "highly offensive" threshold, preferring instead to address such considerations in an assessment of the proportionality of the breach of privacy, weighed against the defendant's interest in the publication or the extent to which it is a matter of proper public concern: [56]-[60].
- What must be "highly offensive" is the publicity given, not the information itself: [35]. The publicity in this case did not meet that threshold: [50]-[53].
- There has been very little development of the tort in New Zealand in the sixteen years since *Hosking*: [39]. It may be that the focus of the "highly offensive" limb has shifted in New Zealand from the publicity given to the nature of the information itself: [44]. There is force in the criticisms that the "highly offensive" limb (i) inappropriately redirects attention to reputational damage, (ii) is unpredictable in its operation, and (iii) is unnecessary in light of the requirement that the plaintiff have a "reasonable expectation of privacy" in the information in question: [70]-[73]. However, significant development of the tort would require attention to concerns about freedom of expression for which the present case is not a suitable vehicle: [75].

International Decision of Interest

Statutory Interpretation: meaning of "worker"

***Uber BV v Aslam* [2021] UKSC 5**

Decision date: 19 February 2021

Lord Reed PSC, Lord Hodge DPSC, Arden, Kitchin, Sales, Hamblen and Leggatt LJJ

The Respondents) had driven private hire vehicles in London using the Uber app. Their claims in the Employment Tribunal served as a test case to establish whether Uber drivers are "workers" for the purposes of various statutes conferring rights and protections. The definition of "worker" in the *Employment Rights Act 1996* (UK) includes an individual working under a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer or any profession or business undertaking carried on by the individual". The Employment Tribunal found that Uber drivers were "workers" for the purposes of that definition. The Employment Appeal Tribunal and the Court of Appeal (by majority) dismissed Uber's appeals. Uber appealed to the UK Supreme Court.

Held: Dismissing the appeal

- The critical issue was whether Uber drivers are to be regarded as performing services under contracts with Uber London or as performing services under contracts made with passengers, through the agency of Uber London: [42]. Applying ordinary principles of contract and agency, the conduct of the parties led to the inference (in the absence of a written agreement between drivers and Uber London) that there was no agency agreement and that Uber contracts with passengers and engages drivers to carry out that work: [50]-[56].

- However, the correct approach must begin not with contractual but with statutory interpretation: [57], [68]-[70]. The legislation in question is intended to protect individuals in a subordinate and vulnerable position from exploitation: [71]-[76]. To allow the written agreements, which Uber controls entirely, to be conclusive of the question would violate the various prohibitions against contracting out of the protections guaranteed by the relevant legislation: [79]-[82].

- Relevant aspects of the relationship between Uber and its drivers include: (i) Uber sets the fare [94]; (ii) drivers have no say in the contract terms on which they provide their services [95]; (iii) drivers are constrained, through penalties imposed by Uber, in their choice whether or not to accept a request [96]-[97]; (iv) Uber exercises control over the way in which services are delivered via its rating system [98]-[99]; (v) Uber prevents drivers from establishing relationships beyond a single ride: [100]. Drivers thus find themselves in a position of vulnerability and dependence, with no ability to improve their economic position through professional or entrepreneurial skill, in a way that attracts the legislative definition of "worker": [101].