Court of Appeal
Supreme Court
Sydney

Decisions of Interest

5 April 2021 – 25 April 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

Health: professional registration and discipline

Medical Council of New South Wales v Smithson **[2021] NSWCA 53**

Decision date: 8 April 2021

Payne JA, Simpson AJA and Garling J

The Medical Council of NSW ('the Council') suspended Dr Smithson's registration pursuant to s 150 of the *Health Practitioner Regulation National Law* (NSW) ('the National Law') based on evidence of potential illicit drug use. Section 150 requires the Council to suspend a practitioner's registration if satisfied that to do so is appropriate for the protection of the health and safety of a person or persons or otherwise in the public interest. Dr Smithson appealed against the Council's s 150 decision to the NSW Civil and Administrative Tribunal ('the Tribunal') under s 159 of the National Law. Section 159 provides for an appeal by way of a new hearing with fresh evidence. The Tribunal proceeded on the basis that it was required to determine whether Dr Smithson was a "fit and proper person" to be registered as a medical practitioner, and considered that there was no "legalistic standard" imposed by the National Law on a s 159 appeal. Having found that the evidence before it did not positively establish that Dr Smithson had consumed illicit drugs, the Tribunal considered itself bound to set aside the Council's decision. The Council appealed.

Held: allowing the appeal

- The role of the Tribunal on a s 159 appeal is to apply s 150, standing in the shoes of the Council, in a *de novo* hearing. The legal standard to be applied is that in s 150. That provision has two independent limbs: a health and safety limb and a general public interest limb. Whilst the two may overlap, the public interest is not subsumed in the health and safety limb. Proceedings under s 150 are not disciplinary but purely protective in nature. On a s 159 appeal, principles of judicial review of administrative decisions are irrelevant to the Tribunal's function and a distraction from its proper task: [20](1)-(4).

- Section 150 contemplates that a practitioner's registration may be suspended in circumstances where relevant questions of fact remain in dispute. The Council, and the Tribunal on appeal, is not required to make conclusive findings of fact and need not finally determine the merits of a matter. Section 150 does not involve consideration of whether a practitioner is a fit and proper person. The decision-maker's role is to determine whether, on the evidence before it, it is appropriate, under either limb of s 150, to make an order suspending a practitioner's registration. The ultimate question for the Tribunal is whether, in light of the evidence before it, allowing a medical practitioner to continue to practise involves an unacceptable risk to the health and safety of the public, or otherwise involves an unacceptable risk to the public interest: [20](5)-(9). The fact that the evidence before the Tribunal did not conclusively establish the facts alleged against Dr Smithson did not resolve that question.

Workers compensation: aggregation of impairments; statutory interpretation

***Ozcan v Macarthur Disability Services Ltd* [2021] NSWCA 56**

Decision date: 12 April 2021

Macfarlan and McCallum JJA, and Simpson AJA

In 2011 Ms Ozcan suffered injuries to her lumbar spine, thoracic spine and right shoulder in a workplace accident. She sustained further injuries to her lumbar spine and thoracic spine in two subsequent incidents, to which the spinal injuries (but not the shoulder injury) from the 2011 incident materially contributed. Ms Ozcan was assessed as suffering whole person impairment of 3% from the shoulder injury, 5% from the thoracic spine injury and 7% from the lumbar spine injury. On appeal from the decision of an arbitrator, the Deputy President of the Workers Compensation Commission held that the spinal injuries could be assessed together but the shoulder injury, not having contributed to the subsequent injuries and not being the same pathology, could not. Section 322 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ('the Act') provides, at subs (2), that impairments resulting from the same injury are to be assessed together, and at subs (3), that impairments resulting from more than one injury arising out of the same incident are to be assessed together. Ms Ozcan appealed from the Deputy President's decision on the point of law concerning the aggregation of impairments. The Respondent, on appeal, relied on the decision in *Department of Juvenile Justice v Edmed* [2008] NSWWCCPD 6 ('*Edmed*'), in which s 322(2) of the Act was interpreted as requiring that injuries, in order to be assessed together, be correctly characterised as "the same injury" in the sense of the same pathology.

Held: allowing the appeal

- All of the injuries "resulted from" and "arose out of" the 2011 incident and should therefore have been treated as the same injury and assessed together: [15]-[18]. Though s 322(2) of the Act is susceptible to an alternative interpretation to that given in *Edmed*, namely that the words "same injury" refer to the very same injury suffered in one particular incident (on the assumption that a single injury might give rise to more than one kind of impairment: [20]), it was not necessary to decide upon the correctness of that decision. *Edmed* did not address the situation of a prior injury said to have materially contributed to a later one: [22]. Moreover, the result in *Edmed* does not require s 322(3) to be read so as to prevent the collective assessment of injuries arising out of the same incident in the sense of that incident having materially contributed to them: [23]-[24].

- The "presumption from amendment" relied on by the Respondent in relation to *Edmed* – suggesting that the construction applied in that case should be considered to have been adopted or acquiesced in by the legislature by reason of the non-amendment of the relevant provision – has no force or validity in circumstances in which it cannot be confidently concluded that the legislature knew of the decision or the relevant interpretation at the time when the statute was amended: [29]-[34].

Tort: negligence; nuisance; non-delegable duties; apportionment

***Woodhouse v Fitzgerald* [2021] NSWCA 54**

Decision date: 9 April 2021

Basten, Meagher and Payne JJA

In late August 2012 the Rural Fire Service (RFS) carried out controlled burns on Mr Fitzgerald's property. On 5 September strong winds reignited a hollow tree and carried a burning branch onto Mr Woodhouse's neighbouring property, where the fire spread and ultimately destroyed his house. Mr Woodhouse brought proceedings against Mr Fitzgerald alleging that he had breached a non-delegable duty to prevent foreseeable risk of harm from the spread of fire, and that the fire constituted an act of nuisance that could have been avoided by taking reasonable care. The RFS is exempted from liability by the *Rural Fires Act 1997* (NSW). The primary judge found that the RFS had been negligent, and that Mr Fitzgerald owed a non-delegable duty to Mr Woodhouse in relation to the risk of the spread of fire. The loss was apportioned between Mr Fitzgerald and the RFS. Mr Woodhouse appealed in relation to the apportionment; Mr Fitzgerald cross-appealed in relation to liability.

Held: dismissing the appeal and allowing the cross-appeal

- The fault standard in cases concerning the escape of fire is a failure to take reasonable care: [44]. The evidence did not support a finding that the RFS had been negligent in relation to the spread of fire; the mere existence of a precaution that might have prevented the harm did not demonstrate a failure to take reasonable care: [69]-[70]. Even if a stricter liability might apply in nuisance, that tort is limited by reference to reasonable user and would not have been made out in this case, as controlled burns in winter months constitute a reasonable use of land with an important public purpose: [47]-[48].

- An owner of land has a non-delegable duty to prevent the escape of fire resulting from the activities of an independent contractor: [44], [50]. It is an open question how s 10 of the *Law Reform (Vicarious Liability) Act 1983* (NSW) and s 5Q of the *Civil Liability Act 2002* (NSW) ('CLA') apply in relation to non-delegable duties where the agents in question enjoy statutory immunities from liability: [49]. The point is unnecessary to decide as the RFS was not negligent and so Mr Fitzgerald was not in breach of his non-delegable duty.

- Apportionment under Pt 4 of the CLA would only be possible if Mr Fitzgerald and the RFS were concurrent wrongdoers as defined in s 34. To be a concurrent wrongdoer in respect of a loss, a party must be or have been potentially liable for that loss, which the RFS, by reason of its statutory exemption from liability, would never have been: [83], [90]-[97]. Even were the RFS to have been a concurrent wrongdoer, s 39(a) of the CLA makes clear that a person vicariously liable for an independent contractor is liable for any proportion attributable to that contractor: [100]-[102].

Interpretation: technical meanings

***Guan v Lui* [2021] NSWCA 65**

Decision date: 23 April 2021

Bell P, Basten and Meagher JJA

Shuangfu Development Pty Ltd owned land which was to be sold by the mortgagee in possession. The mortgagee appointed agents to conduct an expression of interest process and negotiate the sale. Ms Guan, interested in the sale as sole shareholder in the mortgagor company and guarantor of the mortgage debt, entered into an agreement with Mr Lui under which he was to introduce potential investors to the property in exchange for a commission. Mr Lui introduced the ultimate purchaser to the property, but took no part in any correspondence between that purchaser and the selling agents. Section 8(1)(a) of the *Property, Stock and Business Agents Act 2002* (NSW) ('the Act') prohibits acting as or carrying on the business of a real estate agent without a licence. Section 8(2)(a) prevents a person from bringing proceedings to recover a commission "for any service performed by the person … as a real estate agent" unless licensed at the time of performance. "Real estate agent" is relevantly defined as a person who carries on business as an agent for various purposes, including for the introduction of a prospective purchaser to a landowner or selling agent. Mr Lui commenced proceedings for recovery of his commission. Ms Guan resisted on the basis that Mr Lui did not hold a real estate agent's licence. The primary judge found in favour of Mr Lui that his services constituted a "one-off" transaction and were not part of any real estate business carried on by him, so that s 8(2)(a) of the Act was not engaged. Ms Guan appealed.

Held: dismissing the appeal

- Section 8(2)(a) may not prevent recovery of a commission for services performed in a one-off transaction not shown to be part of a business: [32]-[37]. Section 8(1)(a) distinguishes between "acting as" and "carrying on the business of" a real estate agent. While the latter would require repetition or continuity, the former may be satisfied by the one-off undertaking of activities which, if repeated, would constitute carrying on that business: [32]. Whether "services performed … as a real estate agent" includes services performed while "acting as" a real estate agent is unclear and need not be decided: [38].

- In any event it was not sufficient merely to establish that Mr Lui engaged in one or more of the activities listed in the definition of "real estate agent"; to engage s 8(2)(a), the services in question had to have been performed "as a real estate agent": [26]. The term "agent" should be given its technical meaning: [42]. "Agency" describes a relationship where one person has authority to create legal relations between a principal and third parties or otherwise represent a principal to third parties: [43]-[54]. Though Mr Lui undertook activities ordinarily performed by a real estate agent, he had no arrangement with or authority from the owner, the mortgagee in possession or the selling agents for the property, nor did he hold himself out as acting for or representing any of those entities: [55]-[58].

Australian Intermediate Appellate Decisions of Interest

Tort: conversion; Evidence: standard of proof

BJEK Pty Ltd v Henbury Cattle Co Pty Ltd & Ors **[2021] NTCA 1**

Decision date: 23 April 2021

Grant CJ, Blokland J and Mildren AJ

The Fogartys, through BJEK Pty Ltd ('BJEK'), own Palmer Valley and run a cattle station on it. In 2014 the Fogartys, together with the Andersons, through the then jointly owned Henbury Cattle Co Pty Ltd ('HCC'), acquired Henbury, to the North of Palmer Valley, to run a cattle station. Henbury was stocked in part with cattle originally from Palmer Valley, sold by BJEK to HCC. The boundary fence between the two properties was substantially removed, so that cattle on Henbury might graze on Palmer Valley. In late 2015 relations between the Fogartys and the Andersons broke down. The Fogartys transferred their interests in HCC to the Andersons, and it was agreed that a muster would be held on Henbury, with the Fogartys given the opportunity to identify and remove cattle belonging to them. Ownership of a number of cattle mustered on Henbury was disputed. BJEK commenced proceedings claiming the disputed cattle from Henbury. HCC counter-claimed in relation to 1807 unidentified cattle it alleged, on the basis of expert and lay circumstantial evidence, must have wandered onto Palmer Valley from Henbury and not been returned. The primary judge found that BJEK had established ownership of six of the disputed cattle, but found for HCC on the counterclaim that 1500 cattle belonging to it had wandered onto Palmer Valley and been converted. BJEK appealed.

Held: dismissing the appeal

- There was no error in the trial judge's findings on the counterclaim. The process of reasoning involved first determining that *some* cattle had been converted, and then determining quantum: [79]. The finding that some cattle had been converted had to be considered in the practical and commercial context of the parties' relationship: [83]. An offer that the Andersons come and reclaim their cattle was clearly disingenuous in circumstances where the Andersons only knew that there existed an unspecified number of their cattle somewhere on Palmer Valley: [85] In light of BJEK's failure to follow industry practice for returning cattle and established willingness to sell cattle which clearly did not belong to it, BJEK clearly intended to exercise such dominion over HCC cattle on Palmer Valley as was repugnant to the rights of HCC as owner: [83]-[86].
- Once conversion had been made out to the requisite standard, it was open to the primary judge to find that 1500 cattle had been converted on the basis of the circumstantial evidence, drawing inferences from factors including the number of cattle returned in the opposite direction, the relative sizes of the herds on either side of the boundary and the tendency for cattle in the region to wander south: [99]-[111]. The number of cattle converted only needed to be established on the ordinary balance of probabilities, rather than a higher *Briginshaw* standard: [89].

Taxation: R&D offset

***Coal of Queensland Pty Ltd v Innovation and Science Australia* [2021] FCAFC 54**

Decision date: 23 April 2021

Logan, Griffiths and Moshinsky JJ

Coal of Queensland Pty Ltd ('CQ') holds an exploration permit for the Fort Cooper Coal Measures ('FCCM'). Coal in the FCCM is found in banded seams and has high ash content, making it commercially unviable to extract using established methods. In 2011 CQ commenced a series of activities, including aerial and seismic surveys of the area and coal sample testing, to investigate the viability of mining the FCCM deposit. In 2013 it applied to have certain activities (undertaken in 2012) registered as R&D activities for the purposes of a tax offset. Section 355-25(1) of the *Income Tax Assessment Act 1997* (Cth) ('the ITAA') defines R&D activities as "experimental activities … whose outcome cannot be known or determined in advance … but can only be determined by applying a systematic progression of work based on principles of established science, proceeding from hypothesis to experiment, observation and evaluation … and that are conducted for the purpose of generating new knowledge". The Respondent determined that the registered activities did not meet the definition of R&D activities, a finding upheld on internal review and by the Administrative Appeals Tribunal ('the Tribunal'). CQ appealed to the Full Court of the Federal court, alleging that the Tribunal had made various factual findings that were not open or had otherwise applied wrong legal tests.

Held: Dismissing the appeal

- The Tribunal did not err in finding that the outcome of the activities could have been known in advance: [96]-[109]. The evidence established that, whilst precise yield values could not have been known in advance, the *outcome* of the work could have been known and determined in advance: [98]-[100]. The outcome of an activity is distinct from the yield values or data that it produces: [104]. The activities were analogous to a routine cholesterol test, where the fact that the precise data or results cannot be known in advance does not mean that the test constitutes an experimental activity whose outcome cannot be known or determined in advance as required by s 355-25(1)(a) of the ITAA: [101].

- The Tribunal did not err in finding that the activities were not conducted for the purpose of generating new knowledge but instead merely built on the body of knowledge already available about the FCCM: [118]. The Tribunal's consideration of whether the activities in question in fact generated new knowledge did not involve the application of a wrong legal test but was relevant to the necessary determination of purpose: [121]. There was ample expert evidence on which to conclude that the data generated by the activities did not constitute new knowledge, as the FCCM deposit was already well-understood and the activities were conducted for the purposes of re-iterating that existing state of knowledge: [119].

International Decisions of Interest

Constitutional law: indigenous rights

***R. v. Desautel* 2021 SCC 17**

Decision date: 23 April 2021

Wagner CJ, Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

In 2010 Mr Desautel, a citizen and resident of the United States, shot an elk in British Columbia. He was charged with two offences under the *Wildlife Act*, RSBC 1996, c 448. He defended the charges on the basis that he had an Aboriginal right to hunt protected by s 35(1) of the *Constitution Act, 1982*. Mr Desautel was a member of the Lakes Tribe in Washington, a successor group of the Sinixt people, within whose ancestral territory he was hunting. The trial judge found that the Lakes Tribe continued to have a connection to the relevant territory in British Columbia and held that Mr Desautel was exercising an Aboriginal right guaranteed by s 35(1) of the *Constitution Act*, infringement of which by provisions of the *Wildlife Act* was unjustified and so of no force or effect. The Crown appealed to the BC Superior Court and Court of Appeal and finally to the Supreme Court.

Held: dismissing the appeal

- The constitutional question to be answered is whether an Aboriginal people located outside Canada can assert rights protected under s 35(1) of the *Constitution Act*: [15]. That provision protects the rights of "the aboriginal peoples of Canada". Whether a group is an aboriginal people of Canada is not the same question as whether a group has an Aboriginal right; the former is a threshold question: [20]. It has not previously been considered: [21].

- The purpose of s 35 of the *Constitution Act* is to recognise the prior occupation of Canada by organised, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them: [22]. Interpreting s 35(1) to include Aboriginal peoples forced from their traditional territories by the imposition of international boundaries reflects the purpose of reconciliation; the alternative risks perpetuating historical injustices inflicted on aboriginal peoples by colonisers: [33]. The Aboriginal people of Canada under s 35(1) are the modern-day successors of Aboriginal societies that occupied what is now Canadian territory at the time of European contact: [1], [23], [47].

- The test for Aboriginal rights is the same for groups outside as for groups within Canada, though their different circumstances may lead to different results: [50], [71]. No issue of sovereign incompatibility arises on the facts of this case: [66].

- [Côté J, in dissent]: To be entitled to s 35 protections a modern-day successor group must be located within Canada: [104]. The purpose of s 35 is to protect rights of Aboriginal peoples as members of and participants in Canadian society, which outside groups cannot be: [114]. The majority's construction raises further difficulties including sovereign incompatibility: [121]-[125].

Intellectual property: copyright; fair use

***Google LLC v Oracle America Inc* 593 US ___ (2021)**

Decision date: April 5 2021

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

Oracle America Inc ('Oracle') owns a copyright in Java SE, a computer platform using the popular Java programming language. Part of Java SE is an Application Programming Interface ('API'): a tool that allows programmers to call upon pre-written computing tasks (contained in implementing code) using shortcuts (method calls) for use in their own programs. The API's 'declaring code' links a method call to a section of implementing code that performs the more complex computing task desired by a programmer. Google, in developing its smartphone platform Android, copied approximately 11,500 lines of declaring code from the Java API. By doing so, Google was able to allow millions of programmers familiar with the Java programming language to easily write programs for Android by using familiar method calls. The Federal Circuit Court found that Google's copying of the Java API did not constitute fair use. Google petitioned the Supreme Court for certiorari.

Held: granting certiorari and reversing the decision below

- The doctrine of fair use prevents the rigid application of copyright statute when to do so would stifle the very creativity that copyright law is intended to promote: 13. Computer programs differ from traditionally copyrightable "literary" works in that they serve functional purposes: 16. Assuming an API to be copyrightable at all, Google's copying of part of the Java API constituted fair use: 1, 15, 35.

- The nature of the work copied points towards fair use: 24. The declaring code in the Java API is inextricably linked to (i) a conceptual division of computing tasks, (which is not copyrightable) (ii) implementing code (which is copyrightable but was not copied by Google) and (iii) specific method calls (whose use by Google Oracle does not contest, and whose value is significantly derived from the time that computer programmers have invested in learning to use an API): 21-24.

- Google precisely copied the relevant code and employed it for the same purpose for which it was originally created. However, in doing so it created a new platform to develop programs for smartphones – a use consistent with the creative progress that is the basic objective of copyright law: 25. Google copied only to the limited extent necessary to allow programmers to use the Android platform without discarding familiar programming language: 26, 29. The market effects on Oracle, even in light of the profitability of Android, is outweighed by the risk of harm to the public and the limitation on future creative progress that enforcement of copyright in an API's declaring code would entail: 34.

- [Thomas and Alito JJ, in dissent]: It makes no difference that the value of declaring code is derived from the investment of others in learning it: 10-11. Google's use of the code is derivative: 16-17. The market effects of Google's copying were devastating for Oracle and point against fair use: 11-14.