Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 June 2021 – 31 June 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

Practice and procedure: joinder

***AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112**

Decision date: 3 June 2021

Meagher and Leeming JJA, Preston CJ of LEC

AQC Dartbrook Management Pty Ltd ("Dartbrook") applied to modify a development consent under s 75W of the *Environmental Planning and Assessment Act 1979* (NSW) ("EPA Act"). The Independent Planning Commission ("IPC"), as delegate for the Minister, partially refused the modification. Dartbrook appealed to the Land and Environment Court ("LEC"), but reached an agreement with the Minister in a conciliation conference under s 34 of the *Land and Environment Court Act 1979* ("LEC Act"). When Dartbrook applied to the LEC for orders reflecting the terms of its agreement with the Minister, the Hunter Thoroughbred Breeders Association Inc ("HTBA") applied to be joined as a party. The primary judge allowed the joinder in order for HTBA to raise the contention that the LEC lacked jurisdiction to make the orders sought. The effect of the joinder was that all the parties (Dartbrook, the Minister, and now HTBA) were no longer in agreement, so that there would have to be a contested hearing on the merits of the proposed modifications. Dartbrook sought leave to appeal against the decision to join HTBA to the proceedings.

Held: granting leave to appeal and allowing the appeal

- Section 8.15(2) of the EPA Act, under which Dartbrook applied to be joined as a party, is not available in respect of an appeal under s 75W: [3], [143]-[154]. Rule 6.24 UCPR is an available source of power, but operates differently, requiring the Court to be satisfied either that a person ought to have been joined or that a joinder is necessary to the determination of all matters in dispute: [3]-[4], [45].
- The jurisdictional question of whether the orders to which the parties had agreed could be made by the LEC in the proper exercise of its functions was necessarily a matter in dispute in the proceedings: [179]-[181]. However, while the parties' agreement may mean that the Court is deprived of full submissions on the question, wishing to make such submissions as an objector without any legal interest affected by the outcome of the litigation did not make HTBA a party whose joinder was necessary within the meaning of r 6.24: [12], [15], [187]-[201]. HTBA's submissions could have been received in other ways, including as an amicus: [19], [197]. Moreover, HTBA's joinder, nullifying the agreement reached under s 34, would subvert the statutory scheme promoting conciliation: [16]-[18].
- Per Preston CJ (Meagher and Leeming JJA finding it unnecessary to decide): the orders sought by Dartbrook, allowing it to amend its application to modify a development consent or approval, were not orders that the LEC could have made in the proper exercise of its functions: [227]-[228], [252]-[260].

Negligence: causation; Evidence; *Browne v Dunn*

***Yebdoo v Holmewood* [2021] NSWCA 119**

Decision date: 3 June 2021

Macfarlan, Gleeson and Leeming JJA

Ms Yebdoo pulled out from behind a right-turning vehicle into the path of Mr Holmewood's motorcycle. Mr Holmewood was driving in between parked cars and the stopped traffic, also intending to pass the right-turning vehicle. He collided with Ms Yebdoo's car and was thrown across the bonnet, landing on the road, where Ms Yebdoo unintentionally drove over him. Ms Yebdoo suffered mental trauma as a result of the incident and sued Mr Holmewood in negligence. The primary judge found that breach had been established (failure to keep a proper lookout) but not causation. Expert evidence had been adduced concerning average reaction times and general rates of deceleration achievable by effective braking, but not from the speed at which the primary judge found that Mr Holmewood's motorcycle had been travelling. Ms Yebdoo appealed on the issue of causation and Mr Holmewood filed a notice of contention on the issue of breach, raising the *Browne v Dunn* issue.

Held: Gleeson and Leeming JJA dismissing the appeal (Macfarlan JA in dissent)

- On the primary judge's findings of fact there was little time for Mr Holmewood to react between when Ms Yebdoo's intention to change lanes could first have become apparent and the collision: [115]. No attempt was made to estimate what minimum speed would have sufficed to propel Mr Holmewood across Ms Yebdoo's bonnet, this being necessary to cause Ms Yebdoo's mental trauma: [119]-[120]. To establish causation, it was necessary to identify how long Mr Holmewood had to react, what his reaction would have been had he been keeping a proper lookout, and how that would have avoided a forceful collision. Given the small distances and times involved, the combination of these considerations was far from straightforward. The available evidence of time and distance was too imprecise and in the absence of expert assessment no finding of causation could be made: [123]. [Per Macfarlan JA, contra: the Court, drawing on its common sense and experience, including matters of common knowledge as to the effectiveness of braking, did not require expert evidence to conclude that the period in which Mr Holmewood might have applied the brakes, had he kept a proper lookout, was sufficient to have significantly lessened the severity of the collision: [43].]

- The case as opened was argued in terms of excessive speed, not failure to keep a proper lookout: [93]-[95]. The fact that there was other evidence before the Court to the effect that Mr Holmewood should have braked sooner did not resolve the *Browne v Dunn* issue of potential unfairness in making findings of breach that had not been put to him: [98]-[103]. [Per Macfarlan JA (Leeming and Gleeson JJA ultimately finding it unnecessary to decide): the principle in *Browne v Dunn* was not infringed as the case advanced for Ms Yebdoo clearly involved the proposition that Mr Holmewood failed to keep a proper lookout: [57]-[58].]

Succession: substitute for specific devise

***Wardy v NSW Trustee and Guardian* [2021] NSWCA 121**

Decision date: 4 June 2021

Macfarlan, Meagher and White JJA

Edward Wardy, the deceased, left a life interest in a Cleveland St property to his second wife Hassiba, with her three children to receive the property in remainder. However, the Cleveland St property was sold to pay debts of the estate. The administrator sought a declaration that it was justified in appropriating a George St property from the residuary estate in substitution for the Cleveland St property the subject of the specific devise. The Cleveland St property had a wholly commercial rental income, which was significantly higher than the mix of commercial and residential income presently earned from the George St property, which was in a state of disrepair requiring significant capital expenditure to bring it to a lettable standard. The beneficiaries of the residuary estate were Hassiba, her three children, and three children from the deceased's previous marriage. John Wardy, of the deceased's previous marriage, opposed the declarations sought. The primary judge declared the substitution authorised on the basis that each property had the same "current value". John Wardy appealed, arguing that the two properties had significant differences that made the substitution inappropriate and alleging certain errors in the primary judge's findings as to the respective values of the properties.

Held: dismissing the appeal

- A substitution of the kind sought requires an equivalence of value, not an equivalence in terms of characteristics such as the residential or commercial nature of the rental income earned: [20]. Any disparities in overall income earning potential were encompassed by the expert assessments of the market value of each property: [20]. There may be cases in which an equivalence in current value will not suffice to fairly adjust the rights of beneficiaries, such as where there are disparities in income-earning potential and the property the subject of a specific devise is subject to life and remainder interests. However in this case Hassiba, who has the life interest in the property and so stands to be disadvantaged by the substitution of a property with lesser income-earning potential, accepts the substitution notwithstanding that disparity: [21]. In those circumstances the appellant has no *bona fide* interest in claiming that the life interest-holder is prejudiced by the substitute: [23].

- While the primary judge's findings concerning the respective values of the properties were not discretionary matters, they were evaluative in nature such that the standard for appellate intervention is analogous to that in *House v The King*: [42]-[43]. No such error was shown.

- The administrative expenses involved in the substitution are to be borne in the proportions estimated to be applicable at the time of the substitution, not at the time of the primary judge's initial orders: [66].

Insurance: total and permanent disability insurance

MetLife Insurance Limited v Sandstrom **[2021] NSWCA 123**

Decision date: 9 June 2021

Basten, Macfarlan and Meagher JJA

Ms Sandstrom was medically discharged from the NSW police force as a result of psychological symptoms arising from traumatic experiences during her service. Through her super fund she claimed total and permanent disability ("TPD") benefits under insurance policies held with MetLife Insurance Limited ("MetLife"). These required Ms Sandstrom to provide evidence to MetLife's satisfaction that she met the policy definition of TPD. MetLife refused Ms Sandstrom's claim. In proceedings commenced by Ms Sandstrom the primary judge held that MetLife had failed to fulfill its contractual duties to deal with her claim in good faith and act fairly and reasonably, and that Ms Sandstrom satisfied the policy definition. Metlife appealed.

Held: Basten and Meagher JJA dismissing the appeal (Macfarlan JA dissenting)

- Where a definition turns on the "satisfaction" of the insurer of some matter, there is a contractual duty to assess the claim in good faith and to act fairly and reasonably, with the Court permitted to make its own assessment of the claim in the event of any breach of that duty: [5]. The inability to directly challenge a decision's merits means that careful scrutiny will be applied in assessing an insurer's compliance with its contractual obligations: [19]. The TPD policy required proof that Ms Sandstrom was "unlikely ever to engage in any gainful profession, trade or occupation for which [she] is reasonably qualified by reason of education, training or experience". This insures against the loss of the insured's ability to pursue employment for which she is prepared or shaped by her past vocational history; she need not show that she is incapable of any remunerative work: [13]. "Unlikely ever" means there must be no "real chance" of such future employment: [17].

- It was unreasonable for MetLife to rely on inconclusive statements referring to the possibility of *some* future work, not addressing the terms of the policy definition, without adverting to subsequent opinions, favourable to the claimant, adopting terms apt to apply to the policy definition: [30], [41]. While it was permissible to place weight on contemporaneous medical opinions, this should have been accompanied by an acknowledgment that the condition would take time to stabilise: [47]. It was unreasonable for MetLife to discount material favourable to the applicant on the basis that it was prepared for another purpose and not responsive to the policy definition when the same was true of material favourable to MetLife and relied on by it without comment: [61]. The cumulative effect of these matters was that MetLife applied inconsistent scrutiny to the claim in breach of its contractual obligations of fairness and good faith: [77]-[78].

- [Macfarlan JA, in dissent: MetLife fairly disregarded statements not bearing on the policy definition and reasonably preferred contemporaneous opinions.]

Defamation: qualified privilege; justification

Schlaepfer v Australian Securities & Investments Commission **[2021] NSWCA 129**

Decision date: 30 June 2021

Meagher, White and McCallum JJA

Mr Schlaepfer was the director of a company that traded on the ASX. In 2014, ASIC became concerned that the company was engaging in a form of market manipulation known as "layering". Without notice to the company, ASIC contacted the company's Australian stockbroker and persuaded it to terminate the company's trading account. A representative of ASIC later contacted senior executives of other stockbrokers to warn them of its concerns. ASIC also published a "market surveillance update" notifying that an overseas firm had recently had its market access terminated and mentioning foreign regulatory action taken against related companies. Mr Schlaepfer sued ASIC for defamation, alleging a number of defamatory imputations, including that he or his companies had engaged in serious market manipulation. The primary judge concluded that Mr Schlaepfer and his companies had not been identified in the relevant statements, that the words said did not convey the imputations pleaded, and that the statutory and common law defences of qualified privilege were made out. Mr Schlaepfer appealed.

Held: dismissing the appeal

- Mr Schlaepfer was sufficiently identified in communications from ASIC, even if neither he nor his companies was named; it is illogical to suggest otherwise when the purpose of the communications was to warn brokers about a particular actor: [168]. Identification may take place after the time of publication, especially where the recipient of the information is effectively invited to discover the identity of a person: [188]-[194]. The imputation that the companies had engaged in serious market manipulation was conveyed to anyone who knew the meaning of the term "layering". The use of the word "concern", in the context of ASIC's communications, suggested more than mere suspicion; indeed it would have suggested a high level of confidence on the part of ASIC: [208]-[209].

- ASIC's failure to distinguish the common law and statutory defences of qualified privilege in its pleadings did no harm insofar as it should have been clear to Mr Schlaepfer's representatives that the plea of reasonableness related to the statutory defence only: [232]. The common law defence was made out. The essence of that defence is community of interest: that the public interest requires a particular recipient to receive frank and uninhibited communication from a particular source: [234]. Protected communications are not limited to those which ASIC is under a legal duty to make, with the availability of other options only relevant to the statutory element of reasonableness: [238], [241]. The statutory defence failed on that element of reasonableness as ASIC (i) represented that a broker had terminated the company's access when, to ASIC's knowledge, the broker had done so in response to pressure from ASIC ([255]), and (ii) failed to give Mr Schlaepfer an opportunity to respond: [260].

Australian Intermediate Appellate Decisions of Interest

Defamation: search engines; innocent dissemination; qualified privilege

***Defteros v Google LLC* [2021] VSCA 167**

Decision date: 17 June 2021

Beach, Kaye and Niall JJA

A 2004 article in *The Age* newspaper contained defamatory imputations about Mr Defteros, who in 2016 lodged a request with Google LLC ("Google") to remove the article from its search results, falsely claiming that the publisher, in a settlement with Mr Defteros, had agreed to remove it. Google declined to remove the article, which was ultimately removed by *The Age*. Mr Defteros commenced proceedings in defamation against Google for publications of the article in the period following his removal request. Mr Defteros was awarded $40,000 in damages, with the primary judge holding that the statutory defence of qualified privilege was made out in relation to a substantial number of persons to whom the article was published. Google appealed, arguing that it was not a publisher of the article and that the defences of innocent dissemination and of qualified privilege at common law and under statute were made out. (Mr Defteros appealed in relation to 2017 proceedings which had been dismissed on the basis of the statutory defence of triviality.)

Held: dismissing the appeals.

- Google was a publisher of the hyperlinked material even if the search results themselves were not defamatory: [78]. Publication of a matter cannot depend on whether that matter carries a defamatory meaning: [83]. The search results incorporated the content of the article by lending assistance to readers and enticing them to access it: [86]-[87].
- To establish innocent dissemination, a subordinate publisher must show that it neither knew nor reasonably ought to have known that a published matter was defamatory: [115]. The reasonableness of a subordinate publisher's belief as to the availability of potential defences to publication of the defamatory material is irrelevant: [144]. Thus Google's inability to determine the truth of the defamatory imputations and the reasonableness of its reliance on underlying sources is irrelevant: [146]. The removal request, despite factual inaccuracies, was sufficient to bring the defamatory nature of the material to Google's attention such that it could not avail itself of the defence of innocent dissemination: [147].
- The community of interest required for the defence of qualified privilege at common law will rarely be found in mass-media publications: [169]-[170], [178]. Mere curiosity or idle interest will not suffice: [182]-[185]. The statutory defence does not require the same community of interest, but the interest of a recipient must still be greater than idle curiosity: [212]. The fact of entering the plaintiff's name in a search engine does not of itself create the requisite interest ([218]), nor does the fact that a subject matter is of general public interest: [229]-[230].

Equity: trusts; Contract: interpretation

Queensland Nickel Pty Ltd (in liq) v QNI Metals Ltd **[2021] QCA 138**

Decision date: 25 June 2021

Fraser and Morrison JJA, Burns J

Queensland Nickel Pty Ltd (QNI) was the manager of a joint venture between the first and second respondents (the "JVCs") running a nickel refinery. QNI sold the manufactured nickel products and held the money received from those sales in accordance with the terms of the Joint Venture Agreement ("JVA"). Clause 6.4(f) relevantly provided that money from sales was to be deposited into an account in QNI's name, from which QNI was to make payments to meet joint venture expenses, with money in the account to be invested by QNI in a prudent manner. Before it went into liquidation, over $100 M had been transferred from QNI's account to Mineralogy Pty Ltd ("Mineralogy", the third respondent and ultimate owner of the JVCs), recorded in an account described as the "Mineralogy Loan Account" and subsequently purportedly forgiven by the JVCs. QNI's liquidators sought recovery of that sum with interest on the basis that the loans were from QNI. The primary judge held that the loan was from the JVCs and so not recoverable by QNI, finding that money in QNI's account was held on a bare trust for the JVCs, which trust was collapsed upon payment to Mineralogy. QNI appealed.

Held: allowing the appeal

- Property is held on a bare trust where the trustee has no interest other than legal title, and no active duties to perform: [53]-[56]. The JVA distinguishes between legal and beneficial ownership of money in the QNI account so as to make the relationship between QNI and the JVCs that of trustee and beneficiary: [58]-[65], [70], [86]. However, the trust thereby created includes a number of duties. Most significantly, QNI is obliged to use money in the account to meet joint venture costs, liabilities and expenses, present and future: [88]-[91]. Thus the JVCs could not require QNI to act so as to deprive itself of the ability to meet such expenses: [92]. Moreover, clause 6.4(f) requires all investments made with money from the QNI account to be made in a prudent manner: [95]. The trust was accordingly not a bare trust, as QNI had a number of ongoing duties: [103], [105]. Consistently with its duty to apply the funds to meet any joint venture expenses properly incurred, QNI was also required to resist any effort of the JVCs to direct payment of the funds for any other purpose: [104]. The consequence is that the trust could not be collapsed by the beneficiaries calling money back to themselves or directing it to be paid to a third party (such as Mineralogy) while relevant joint venture expenses remained unpaid: [108].

- Contemporaneous evidence suggested that the loans to Mineralogy were treated as loans from QNI: [124]-[126]. In any case, regardless of any contrary understanding on the part of Mineralogy, all loans from the account had to be from QNI as trustee, not the JVCs, as the funds were held on trust to meet legitimate joint venture expenses: [171]-[173].

International Decision of Interest

Tort: negligence; negligent advice

***Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20**

Decision date: 18 June 2021

Reed PSC, Hodge DPSC, Black, Kitchin, Sales, Leggat and Burrows SCJJ

In 2006 and in subsequent annual audits, Grant Thornton UK LLP ("Thornton") negligently advised the Manchester Building Society ("the society") that it could prepare its accounts relying on interest rate swaps as an effective hedge against the cost of borrowing money. Its accounts thus prepared hid the volatility of the society's capital position when the value of the interest rate swaps went negative. In 2013 it was revealed that the interest rate swaps were not in fact an effective hedge and that the society was not entitled to report them as such in its accounts. The society was then required to close out the interest rate swaps early, at a cost of £32 million, in order to comply with regulatory capital requirements. The primary judge and the Court of Appeal held that Thornton was not liable for the cost of closing out the swaps. The society appealed to the Supreme Court.

Held: allowing the appeal

- The scope of a professional adviser's duty is governed by the purpose of the duty, ascertained by reference to the reason for which the advice was given [13]. It extends to losses representing the fruition of a risk against which the advice was supposed to guard: [17]. The distinction drawn in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 ("*SAAMCO*") between 'information' and 'advice' is unhelpful; the focus should be on identifying the purpose of the duty: [18]-[19], [92]. The "*SAAMCO* counterfactual", asking whether a claimant's actions would have resulted in the same loss if the advice in fact given by the defendant had been correct, is simply a cross-check and does not replace the inquiry as to purpose; in more complex cases its application in place of that inquiry may lead to error: [23]-[26], [101], [105]-[106].

- The focus of the scope of duty analysis should be on the purpose of the duty without reference back to policy considerations: [5] (cf Burrows SCJ: [192], [203]). The *SAAMCO* approach serves to fairly reflect the assumption of risk in the service provided by identifying commercial risks which the recipient of advice was willing to bear itself: [87]-[88]. The counterfactual test may help to identify such risks by asking whether the actions taken by the claimant would have resulted in loss if the same advice had been given but was correct: [128].

- The commercial reason for which the society sought Thornton's advice was to assess the impact of hedge accounting on its regulatory capital position. The society's loss represented the fruition of a risk – of misunderstanding the viability of hedge accounting for its business – which Thornton's advice was supposed to guard against. It thus fell within the scope of Thornton's duty of care: [38], [150].

Tort: negligence; negligent medical advice

***Khan v Meadows* [2021] UKSC 21**

Decision date: 18 June 2021

Reed PSC, Hodge DPSC, Black, Kitchin, Sales, Leggat and Burrows SCJJ

Ms Meadows (the appellant) consulted Dr Khan (the respondent) to determine whether she was a carrier of the haemophilia gene. Ms Meadows was incorrectly and negligently advised that she was not a carrier of the gene. She subsequently conceived and gave birth to a son who was diagnosed with haemophilia and later with autism. It was accepted that, had Ms Meadows known that she was a carrier of the haemophilia gene, she would have undergone foetal testing and chosen to terminate the pregnancy. It was also accepted as reasonably foreseeable as a consequence of Dr Khan's negligence that Ms Meadows might give birth to a child that suffered from a condition such as autism in addition to haemophilia. It was not disputed that Dr Khan was liable in negligence for the costs attributable to the child's haemophilia. The High Court held that Dr Khan was also liable for costs attributable to the child's autism, but was overturned by the Court of Appeal. Ms Meadows appealed to the Supreme Court.

Held: dismissing the appeal

- Clinical negligence is no exception to the scope of duty principle; a doctor is only liable for losses falling within the scope of his or her duty of care to advise on a particular matter: [62]. A helpful model for analysing the scope of duty principle within the tort of negligence involves asking six questions in sequence: (i) is the loss actionable?; (ii) what is the scope of the defendant's duty of care?; (iii) did the defendant breach that duty?; (iv) was the loss claimed factually caused by that breach; (v) is there a sufficient nexus between the loss claimed and the subject matter of the duty?; (vi) are there further reasons (remoteness; intervening causes) why legal responsibility ought not to fall on the defendant?: [28]. Answers to questions of factual causation and foreseeability cannot circumvent the scope of duty inquiry: [30]. Foreseeability may be relevant to the extent that an absence of foreseeability would speak against the existence of a duty of care in relation to a given risk, but it is not determinative because the scope of duty question turns on the nature of the service which the defendant has undertaken to provide: [65]. It is thus often helpful to ask the scope of duty question at an earlier stage: [38]. The *SAAMCO* counterfactual may be used in negligent advice cases to address the duty nexus question: [53].

- Ms Meadows approached Dr Khan seeking advice in relation to a particular risk: that of giving birth to a child with haemophilia. The duty to take reasonable care to give accurate information or advice related to that risk: [67]. This answer to the scope of duty question provides a straightforward answer to the duty nexus question: the law did not impose on Dr Khan any duty in relation to unrelated risks which might arise in any pregnancy: [68]. The *SAAMCO* counterfactual confirms the absence of a nexus between the duty and the loss: [68].