Court of Appeal
Supreme Court
Sydney

Decisions of Interest

26 September 2022 – 9 October 2022

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

Torts: false imprisonment; malicious prosecution

Edwards v State of New South Wales **[2022] NSWCA 187**

Decision date: 26 September 2022

Macfarlan, Gleeson and Kirk JJA

On 25 February 2011, Mr Edwards (the appellant) was charged with an offence of causing grievous bodily harm to another with intent to murder him. Mr Edwards was acquitted on 26 February 2013 after the jury at his trial returned a verdict of not guilty. He subsequently commenced proceedings in the Supreme Court against the State of New South Wales (the respondent) claiming damages for false imprisonment and malicious prosecution, alleging that the State was vicariously liable for the conduct of Detective Senior Constable (DSC) Gill, the Officer-in-Charge of the investigation. The primary judge found that DSC Gill ceased to be a prosecutor in the relevant sense on 2 March 2011, DSC Gill acted with reasonable and probable cause and without malice, and Mr Edward's detention did not cease to be justified once his electronically recorded interview with police concluded. Mr Edwards appealed this decision.

Held: dismissing the appeal

- The primary judge did not err in finding that not only was his initial arrest authorised by statute (a matter that was not in contest), but also that the continuation of his detention until bail was refused by the Magistrate was similarly authorised, or in finding that the matters known to DSC Gill following the electronically recorded interview justified Mr Edwards' detention being maintained. Those matters provided reasonable grounds for DSC Gill's suspicion that Mr Edwards had committed a serious offence: [91].

- The primary judge did not err in finding that DSC Gill ceased to be a prosecutor for the purposes of the tort of malicious prosecution once the prosecution was taken over by the DPP. DSC Gill's conduct did not go beyond that of the conventional role of a police officer assisting in the preparation of a prosecution under the control of the DPP (*Stanizzo v Fregnan* [2021] NSWCA 195 and *State of New South Wales v Landini* [2010] NSWCA 157): [95]-[100].

- The primary judge did not err in finding that DSC Gill acted with reasonable and probable cause. At its highest, Mr Edwards' case did no more than demonstrate that, arguably, there were ways in which the inquiries and investigations into Mr Fing's shooting could have been handled more diligently and more efficiently. It was by no means clear that the investigation departed from common practice or a standard that was reasonable in all the circumstances: [93].

- The evidence did not indicate the existence of malice on the part of DSC Gill: there was no basis in the evidence for concluding that DSC Gill acted otherwise than for the purposes of appropriately invoking the criminal justice system: [94].

Constitutional Law; Restitution; Limitation of Actions

Sims v Commonwealth of Australia **[2022] NSWCA 194**

Decision date: 4 October 2022

Bell CJ, Meagher and White JJA

Mr Sims (the appellant) was an Able Seaman in the Royal Australian Navy (the Navy) between 2000 and 2009. After he left the Navy, the Commonwealth mistakenly continued to pay his salary until 2015, amounting to over $300,000. This included payments made to the appellant, and to others per the appellants directions prior to his leaving, and payments withheld as PAYG tax. The Commonwealth commenced proceedings in the Supreme Court in 2019, seeking a restitutionary remedy, on the basis that the payments were made under a mistake of fact and had unjustly enriched the appellant, or that the payments were made without any legislative authority and are ultra vires. The primary judge found that the Commonwealth's claim was not subject to a limitation period, a claim pursuant to the *Auckland Harbour Board v The King* [1924] AC 318 ("*Auckland Harbour Board*") principle was not restitutionary or a claim in "quasi contract" but a "stand-alone common law cause of action", and the mistaken payments to others were recoverable. Mr Sims appealed this decision.

Held: allowing the appeal

- Having regard to the drafting history of the *Limitation Act 1969* (NSW) ("the *Act*"), and to common understandings of the term "quasi contract" around the time of the *Act*'s passage, the term "quasi contract" in s 14(1)(a) should be understood to encompass the action for moneys had and received: [56]–[68], [79]. The claims answering the description of actions founded in "quasi contract", as the term is used in the *Act*, are identified by the forms of action by which they were originally made – principally the action in *indebitatus assumpsit* for money had and received – and the non-contractual and remedial nature of the payment obligation which the common law imposed: [127].

- The modern Australian cases recognise the action to recover moneys paid *ultra vires* as one for moneys had and received, and that this form of claim was part of the law of quasi contract when the *Act* was passed: [78]. The claim in the current case based on the *Auckland Harbour Board* principle was one in "quasi contract" within the meaning of s 14(1)(a) of the *Act*: [80]. The obligation imposed by the common law upon the appellant arose out of the circumstances in which the money was paid to and received by the appellant. The Commonwealth's claim would have been formulated as being for money had and received; and in a taxonomy which adhered to a rigid dichotomy between personal actions founded in contract and tort, the claim would have been treated as founded in quasi contract: [151].

- The limitation period should not be postponed because the error could, with reasonable diligence, have been picked up at any time following the appellant's separation from the Navy: [86]–[87]. The primary judge erred in finding that the payments to Ms Dalton after the appellant left the Navy were made at the appellant's direction: [101]. Any action for restitution in respect of those payments lay against Ms Dalton: [102]-[103]. Any benefit conferred on the Appellant by reason of the PAYG withholding amounts did not flow to him until he filed a tax return entitling him to a refund: [107]. Accordingly, the Commonwealth's claim for these amounts was within the limitation period: [108]–[109].

- To the extent that necessity forms part of any test of or for constitutional implication, no such necessity existed which would justify the drawing of a constitutionally sourced and entrenched implied right of recovery in respect of ultra vires payments: [94]-[97].

Negligence: medical practitioner; failure to diagnose

***Williams v Fraser* [2022] NSWCA 200**

Decision date: 7 October 2022

Macfarlan, Gleeson JJA and Simpson AJA

Hailee Williams (the appellant) was born with a condition known as a pars defect or dysplastic spondylolysis. In 2009, the appellant was treated for pain in her left hip. The appellant commenced work at a childcare centre, which required repetitive lifting. She again developed pain in 2012 and had X-rays of the hip and pelvis which revealed the pars defect. However, Dr John Fraser (the respondent), a radiologist, and Dr Stening, the appellant's orthopaedic surgeon failed to identify the defect. Dr Stening made an incorrect diagnosis and ordered conservative treatment. The appellant's symptoms did not abate and in 2013, she had an X-ray of her spine which showed a forward slipping of one vertebral disc on another (known as 'spondylolisthesis') due to the pars defect. A different orthopaedic surgeon performed spinal surgery, which caused a secondary chronic pain syndrome. The appellant commenced proceedings in the Supreme Court, alleging that the respondent's failure to identify spondylolysis constituted a breach of his duty of care, which resulted in the need for surgery and the chronic pain syndrome. The respondent admitted a breach of duty of care. The primary judge held that the appellant had not established a causal link between the respondent's failure to diagnose the appellant's condition, the need for the surgery and the chronic pain syndrome. Ms Williams appealed this decision.

Held: dismissing the appeal

- The primary judge did not err in approaching the question of causation on the basis that, as at 24 May 2012, the appellant already had spondylolisthesis: [89]. On the basis of the expert evidence, the conclusion that the appellant already had spondylolisthesis was inevitable, notwithstanding the radiologists' conflicting evidence: [88], [5]-[6].

- The appellant's submission that the primary judge mischaracterised the appellant's case should be rejected: [102]. There was no evidence that the appellant's employment at the childcare centre in fact aggravated her condition or caused disc or other damage: [98]. In any event, the appellant did not pursue a separate case of damage constituted by disc and other damage; the cause of action on which the appellant sued was based upon damage constituted by her chronic pain syndrome: [100]-[101].

- The primary judge did not err in finding that, regardless of the respondent's negligence, the appellant inevitably faced surgery. The overall medical evidence was insufficient to establish, on the balance of probabilities, that the appellant would have "stabilised out" and avoided surgery: [110]-[123].

- In a claim for damages for personal injury caused by medical negligence, proof of a lost opportunity for a better outcome of treatment is insufficient; damage must be established on the balance of probabilities: [127]. The appellant's proposition that the primary judge proceeded on the basis that her claim was for "loss of a chance" was untenable: [128]. The primary judge was acutely aware of the distinction between proof of damage on the balance of probabilities and proof that appropriate treatment would have offered the appellant a chance of a better outcome. The appellant's submission that the primary judge erred by failing to determine the matter from a *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20 perspective, was concerned with the assessment of damages after liability had been established and was not relevant to this appeal: [129]-[131].

Contracts: shareholders agreement; construction

***Alora Property Group Pty Ltd as trustee for Alora Property Group Trust v Henry McKenna (as Liquidator of Alora Davies Development 104 Pty Ltd* [2022] NSWCA 197**

Decision date: 5 October 2022

Ward P, Macfarlan and Brereton JJA

The company, Alora Davies Developments 104 Pty Ltd, was wound up in insolvency on 6 May 2020. It had been the vehicle for a joint venture between its two shareholders, "Alora" and "Davies", to develop real property. The arrangements between the shareholders were contained in a shareholders agreement, which *inter alia* provided for a fee of $8000 plus GST per lot for project managing the development "to be paid as an expense by the Company to Alora (or its nominee), prior to the disbursement of funds via dividends or profit share between the Shareholders". On appeal to the Supreme Court, the primary judge dismissed an appeal brought by Alora Property Group Pty Ltd as trustee for Alora Property Group Trusts (the appellant) ("APG") (Alora's nominee and related entity) from a rejection of its proof of debt for project management fees on the basis that as the development had not been completed and there were no proceeds available for distribution, no entitlement to any fees had accrued. APG appealed this decision.

Held: dismissing the appeal

- The proper construction of the relevant clause of the shareholders agreement was that the project management fees would be payable only upon funds becoming available upon completion of the development project by sale: [19]. Project management was expressly not limited to managing the development application process, and so contrary to the appellant's contention, that alone could not be enough to earn the fee. Before the fee was earned, the appellant had to do whatever else was involved in project managing the property development, which required that the project be brought to completion: [13], [19].

- In circumstances where the company was the corporate vehicle for the joint venture to develop the land and the shareholders agreement provided that the shareholders had no obligation to provide further funds, there could not have been in contemplation any source of funds for payment of expenses, other than the proceeds of the development project – which could only be derived from sale of the development. The purpose of the provision that the fees are to be paid "prior to the disbursement of funds via dividends or profit share" was to ensure that Alora's fees would be paid in priority to distribution of any surplus between the shareholders, once funds were available – a situation which would only arise upon completion of the project by sale of the land: [14], [19].

Australian Intermediate Appellate Decisions of Interest

Family Law: conflict of interest

Charisteas & Charisteas **[2022] FedCFamC1A 160**

Decision date: 7 October 2022

Alstergren CJ, McClelland DCJ and Aldridge J

In 2011, property settlement orders were made under s 79 of the *Family Law Act 1975* (Cth) ("the *Act*") ("the 2011 Property Orders"). In 2013, these orders were set aside. The Family Court of Western Australia found that despite the 2011 Property Orders, the Court had jurisdiction to make property settlement orders under s 79 of the *Act*. The trial judge made these final orders in 2018. The Full Court of the Family Court of Australia dismissed an appeal which, relevantly, alleged apprehended bias due to contact between Ms D, being the wife's junior counsel, and the judge. The wife successfully appealed that decision to the High Court, and the matter was remitted for hearing. In the rehearing, the wife indicated that AF Business Funding Limited ("AF"), being a client of Firm Y and Mr P, was paying her legal fees to Firm Y, Mr P and Ms D. The primary judge found that there was no conflict of interest in Firm Y, Mr P and Ms D acting for both the wife and her litigation funder and made a dollar-for-dollar costs order. The husband appealed this decision.

Held: allowing the appeal

- The primary judge applied the incorrect test in considering whether to restrain the wife's lawyers from acting for her: [34], [36]. The correct test is "whether a fair-minded, reasonably informed member of the public might conclude that the proper administration of justice requires that a solicitor be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice" (*Porter v Dyer* (2022) 402 ALR 659): [37].

- The primary judge erred in failing to have regard to the "real or substantial possibility of a conflict" between the interests of the respective clients of Firm Y and Mr P: [40], [53]. The wife owed AF at least $3.6 million, and AF had an interest in ensuring that the adjustment of the parties' property was reflected as a transfer of property to the wife, rather than the settlement being structured on an alternative basis: [42].

- The primary judge erred in failing to have regard to the fact that Ms D was in a position of conflict in acting for the wife, because an application for costs had been made against Ms D: [54]. Ms D was personally subject to an application for costs in respect to the 2016 proceedings. That gives rise to a conflict between her and the wife because of the tension between whether one or both of them pay costs and in what proportion, in the event of such a costs order being entered against them: [55].

- The primary judge's conclusion that the wife has no prospects of being able to secure alternate legal representation, was merely speculative and any difficulties that the wife may potentially face in obtaining alternative legal representation does not justify the Court tolerating the identified actual conflicts of interest: [60].

- The Court should proceed on the basis that s 117 of the *Act* empowers the Court to make litigation funding orders, including dollar-for-dollar amounts: [77]. Regardless, s 114 amply provides the basis for such orders: [78]. The primary judge erred in failing to consider the fact that it would be very difficult to make a litigation funding order, especially a dollar-for-dollar order, in favour of a commercial litigation funder: [86]-[87].

Patents: validity; inventive step

Pharmacia LLC v Juno Pharmaceuticals Pty Ltd **[2022] FCAFC 167**

Decision date: 29 September 2022

Jagot, Yates and Downes JJ

Pharmacia LLC ("Pharmacia") and Pfizer Australia Pty Ltd ("Pfizer") (the appellants and cross-respondents) were respectively the owner and exclusive licensee of a patent which relates to the formulation and administration of cyclooxygenase-2 (COX-2) inhibitors. Pharmacia develops and Pfizer markets and supplies Dynastat products. Dynastat's active ingredient, parecoxib, converts to the selective COX-2 inhibiting drug valdecoxib following administration. Neo Health (Australia) Pty Ltd ("Neo") supplied parecoxib products to Juno Pharmaceuticals Pty Ltd ("Juno") who sells and supplies products in Australia. Pharmacia and Pfizer commenced proceedings against Juno and Neo (the respondents and cross-appellants) in the Federal Court for infringing the patent. The respondents cross-claimed alleging that the asserted claims in the patent were invalid. The trial was conducted by reference to the batch records for six batches of the alleged infringing products ("the Exemplar Batches"). The primary judge found, relevantly, that three of the exemplar batches infringed the patent and upheld the validity of the relevant claims. Pharmacia LLC and Pfizer Australia Pty Ltd appealed this decision, and Juno and Neo cross-appealed.

Held: dismissing the appeal and cross appeal

- The total weight of a pharmaceutical composition includes any residual water in the powder because: if a composition contains some residual water, then the "weight of the composition" includes the weight of that water; the specification defines "excipient" to mean "all non-therapeutically active components of the composition except for water"; the specification teaches that a powder composition of the invention will likely contain residual water; some claims explicitly exclude water; the variability of the water content can be moderated; the claims define "comprise" as inclusive: [39]-[50].

- The primary judge did not err in concluding that the word "about" should be confined to rounding to the nearest whole percentage point: [55], [75]. The meaning of "about" cannot extend the range contained in the patent beyond rounding because Formulation D would otherwise fall outside the scope of claim 1: [74].

- The appellants' proposition that the different buffering agents involved a "distinction … without a difference" was rejected because: the buffers used are different; whether the heptahydrate will become anhydrous upon lyophilisation, depends on the residual water being bound or adsorbed to the sodium phosphate or parecoxib in the composition, or both; one could only be confident that the buffer is anhydrous when there is no residual water in the powder form of the composition; if residual water is present, then dibasic sodium phosphate may be present in a number of different hydrated forms; and it is not possible to say which form of dibasic sodium phosphate will be present in the powder form of the composition, without further analysis: [83]-[90].

- No weight for pH adjusters should be included in the calculation of the percentages by weight of the composition in the Non-Infringing Exemplar Batches: [114]. The evidence did not disclose whether any pH adjuster had been added: [115]-[116].

- The patent had an inventive step because the obtaining of parecoxib sodium, selection of a "formulation with [the] minimal components claimed in the patent" and use of mannitol in the pre-lyophilisation solution would not be obvious to a person skilled in the relevant art in light of the common general knowledge: [119]-[121].

Asia Pacific Decision of Interest

Derivative Actions; Standing

Soka Gakkai International of Hong Kong Ltd v Lam Kin Chung **[2022] HKCFA 21**

Decision date: 6 October 2022

Mr Justice Ribeiro PJ, Mr Justice Fok PJ and Mr Justice Lam PJ

Soka Gakkai International of Hong Kong Limited ("the Company") (the applicant) is a company limited by guarantee set up for exclusively charitable purposes. At all material times, its management was in the hands of a Committee comprised of 1,089 members. Mr Lam Kin Chung (the respondent) is a member who complained about two property transactions entered into on behalf of the Company in 2011. A property was sold for $80 million which the respondent alleged was at a substantial undervalue. The second property was purchased for $23.8 million which the respondent said was only worth $18.5 million. The respondent also complained of the manner in which the Committee entered into those transactions. Mr Lam Kin Chung sought leave to bring a statutory derivative action against 19 Committee members alleging that they were in breach of their duties to the Company. The Company challenged the respondent's *locus standi* to bring a derivative action. At first instance, Harris J found that Mr Lam Kin Chung did have standing and granted leave for the derivative action. The primary judge dismissed an appeal to the Court of Appeal. The Company sought leave to appeal this decision

Held: refusing leave to appeal

- The Company's application lost sight of the issues with which the Court of Appeal were actually concerned, namely, whether there was a serious question to be tried and whether the proposed derivative action was apparently in the Company's interests so as to justify exercise of their discretion in favour of granting leave to bring such an action, taking account of the subsequent EGM resolutions: [20]-[22].

- Harris J was entitled to hold that the requirements in s 733 of the *Companies Ordinance* (Hong Kong) Cap 622 ("CO") were met and that leave to bring a derivative action should be granted. The Court of Appeal endorsed his view. There was no basis for granting leave with a view to the Court of Final Appeal interfering with their leave decisions which are interlocutory and fact-specific, raising no questions of great general or public importance: [23].

- Section 734(2) of the CO expressly provides for the court to take EGM resolutions into account both in deciding whether to grant leave and in deciding its judgment in the subsequent proceedings. Thus, leave having been given, the trial judge in deciding on the effect to be given to those resolutions in the context of the action, will have regard to the matters set out in CO section 734(3) including whether the members were acting for proper purposes in the light of the company's interests and its exclusively charitable purposes; the extent to which members were connected to the conduct complained of; and how well informed about the relevant conduct members were when casting their votes. An application for leave to bring a derivative action is not the forum in which extensive conflicts of evidence and substantial arguments of law can be dealt with: [25].

International Decision of Interest

Corporations Law: director's duties; insolvency

BTI 2014 LLC v Sequana SA and others **[2022] UKSC 25**

Decision date: 5 October 2022

Reed PSC, Hodge DPSC, Briggs, Arden and Kitchen LJJ

In May 2009, AWA distributed a dividend of €135 million ("the May dividend") to its sole shareholder, Sequana SA ("Sequana"). At this time, AWA was solvent. However, it had long-term pollution-related contingent liabilities of an uncertain amount and an insurance portfolio of an uncertain value. There was a real risk that AWA might become insolvent in the future. AWA went into insolvent administration in October 2018. BTI 2014 LLC ("BTI") (the appellant), is the assignee of AWA's claims. BTI commenced proceedings in the High Court seeking to recover the May dividend on the basis that the directors' decision to distribute the dividend was in breach of an alleged "creditor duty. This claim was rejected. On appeal to the Court of Appeal, the primary judge found that the creditor duty did not arise until a company was either actually insolvent, on the brink of insolvency or probably headed for insolvency. Since AWA was not insolvent or on the brink of insolvency in May 2009, BTI's creditor duty claim failed. BTI appealed this decision.

Held: dismissing the appeal

- Section 172(1) of the *Companies Act 2006* (UK) ("the *Act*") requires directors to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members. In certain circumstances, this duty is modified by the common law rule that the company's interests are taken to include the interests of the company's creditors as a whole [11]; [152]; [207]; [250]. The creditor duty should be affirmed because: first, the duty is supported by a long line of case law; second, the majority held that the duty is affirmed, or its possible existence is preserved by s 172(3) of the *Act*; third, the duty has a coherent and principled justification: [29]-[36], [43], [69]-[71], [76], [152]-[153], [207], [209], [224], [344], [387]-[416]. Directors owe their duties to the company, rather than to the creditors directly: [11], [112], [135], [261]-[277].

- The creditor duty can apply to a decision by directors to pay a dividend which is otherwise lawful, for two reasons: first, pt 23 of the *Act* is subject to any rule of law to the contrary; second, a decision to pay a dividend that is lawful under pt 23 may still be taken in breach of duty: [110], [160]-[162], [247(ii)], [342].

- Where the company is insolvent, or bordering on insolvency, but is not faced with an inevitable insolvent liquidation or administration, the directors should consider the interests of creditors, balancing them against the interests of shareholders: [81]-[82]; [176]-[177]; [303]. Lady Arden held that where the rule in *West Mercia Safetywear Ltd (in liq) v Dodd* [1988] BCLC 250 applies, directors may not exercise any of their powers so as to harm creditors' interests [288]. The creditor duty was not engaged in this case because, at the time of the May dividend, AWA was not actually or imminently insolvent: [14]; [83]; [199]; [306]. The majority held that the creditor duty is engaged when the directors know, or ought to know, that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable: [203]; [231]. Lord Reed and Lady Arden agreed but left open the question of whether it is essential that the directors know or ought to know that this is the case [90]; [281].