SHORT PARTICULARS OF CASES

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WICKS v STATE RAIL AUTHORITY OF NEW SOUTH WALES KNOWN AS STATE RAIL (S27/2010)

SHEEHAN v STATE RAIL AUTHORITY OF NEW SOUTH WALES KNOWN AS STATE RAIL (S28/2010)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 261

Date of judgment: 31 August 2009

Date of grant of special leave: 12 February 2010

The appellants were serving police officers who attended the scene of the Waterfall train crash in which seven people were killed and many more were injured. They were among the first on the scene and they were intimately involved in the rescue operation. The appellants each brought a claim for damages against the State Rail Authority of NSW ("State Rail"), alleging he had suffered a psychiatric injury due to its negligence. That negligence was said to be State Rail's failure to ensure that the train's "*deadman's*" safety device was operating, or was designed to operate, in the event of a driver's incapacitation.

The primary issue at trial was whether the appellants had satisfied ss 30(2)(a) and 32(2)(b) of the *Civil Liability Act* 2002 (NSW) ("the Liability Act") by having witnessed a person "*being killed, injured or put in peril*". Associate Justice Malpass held that they did not. Consequently neither was entitled to damages for pure mental harm.

On 31 August 2009 the Court of Appeal (Beazley & Giles JJA, McColl JA dissenting) dismissed the appellants' appeals. The majority held that for a person to satisfy ss 30(2)(a) and 32(2)(b) of the Liability Act, that person must directly observe the causal event whereby another person is killed, injured or put in peril. They found that ss 30(2)(a) and 32(2)(b) of the Act did not extend to persons, including rescuers, who arrive at the scene after the incident was over. Justice McColl however held that it was not necessary for a person seeking to satisfy s 30(2)(a) to have been present at the time of the principal causal event.

The grounds of appeal (in both matters) include:

- The Court of Appeal erred in law in holding that the requirements of s 30(2)(a) of the Liability Act, under which the appellant was not entitled to recover damages for pure mental harm unless he witnessed, at the scence, the vicitim being killed, injured or put in peril, were not satisfied by the appellant, a police officer, who suffered psychological injury as a result of rescue work at the site of the Waterfall rail disaster, because although the injured, trapped or escaping passengers were at risk of physical injury and mental harm during the appellant's rescue work, the appellant was not present at the scene when the train derailed and crashed.

OSLAND v SECRETARY TO THE DEPARTMENT OF JUSTICE (M11/2010)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2009] VSCA 69

Date of judgment: 7 April 2009

Date special leave granted: 12 February 2010

The appellant was convicted in 1996 of murdering her husband. After unsuccessfully exhausting avenues of appeal, in July 1999 she submitted a petition for mercy to the Victorian Attorney-General (the Attorney). In a press release announcing that the petition had been refused, the Attorney referred to memoranda of advice received from three senior counsel. The appellant sought access to those documents, under the *Freedom of Information Act* 1982 (Vic) ('the Act'). The Department of Justice refused access to the documents, but its decision was overturned by the Victorian Civil and Administrative Tribunal (VCAT). VCAT found that the documents were exempt from production and that legal professional privilege had not been waived; however public interest nevertheless required access to be granted under s 50(4) of the Act. The respondent successfully appealed to the Court of Appeal (Maxwell P, Ashley JA and Bongiorno AJA). The appellant was then granted special leave to appeal to this Court, which ultimately ordered that the matter be remitted to the Court of Appeal. In essence, this Court held that, in relation to advice as to which the appellant sought access under the *Freedom of Information Act* 1982 (Vic) ("the Act"), the Court of Appeal erred in failing to inspect the impugned documents before finding the so-called public interest override in s 50(4) did not apply (which would have allowed access to the documents).

On remittal, the appellant contended that the public interest override in s 50(4) applied, because the press release by the Attorney was misleading since it omitted reference to the different advices received by the Attorney with respect to any possible pardon of the appellant. The appellant's representatives and the Court had access to the advices on a confidential basis.

The Court of Appeal (Maxwell ACJ, Ashley JA and Bongiorno AJA) found that there was nothing in the content of the advices, and in particular nothing in the revealed differences, that attracted the operation of s 50(4). It was common ground that the public interest override applied only where public interest *required* disclosure. This was a stringent test. Regard had to be had to the evident purpose of the Attorney's announcement, that is, provision of information to the public at large. There was nothing in the language of the press release, or in the surrounding circumstances, which warranted a finding that the Attorney represented to the public either that the joint advice was the only advice he received or that he had received no advice to the contrary. The announcement was not intended to enable members of the public to make an assessment of whether the Minister had made the right decision and was not a statement of reasons for the decision. As to whether the public interest required disclosure in the circumstances of the case, the Court found that, having read the advices, there was nothing about the petition, the advices, the particular process of decision making or the announcement which compelled disclosure of the advices in the public interest. The Court concluded that the instant case involved an

orthodox process of government decision making. The seeking of more than one advice was unexceptionable and the preference of one view over another was also unexceptionable. There was no occasion for the exercise of the discretion under s 50(4).

The grounds of appeal include:

- The Court of Appeal did not perform the task required of it in accordance with the High Court's remittal in that it failed to determine that, in the circumstances of the present case, s 50(4) of the *Freedom of Information Act* 1982 (Vic) was enlivened as a result of those material differences.

- The Court of Appeal erred in concluding that, notwithstanding the content of the press release, there was nothing in the content of the legal advices provided to the Attorney-General, and nothing in the revealed differences between those advices, and their extent, that attracted the operation of s 50(4) of the FOI Act.

DUPAS v THE QUEEN (M20/2010)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2009] VSCA 202

Date of judgment: 17 September 2009

Date special leave granted: 12 February 2010

The appellant was charged with the murder of Mersina Halvagis at Fawkner Cemetery on 1 November 1997. He applied to the trial judge (Cummins J) for a permanent stay of the trial on the ground that adverse pre-trial publicity about two previous notorious murder convictions made a fair trial impossible. Cummins J refused the application. He concluded that a jury, properly directed, could be trusted to decide whether the appellant's guilt had been established on the basis of the evidence, and without regard to anything else they might have learned about him from other sources. The appellant was convicted by a jury on 11 July 2007.

The appellant sought to appeal to the Court of Appeal (Nettle, Ashley & Weinberg JJA) and relied on 8 grounds. Ground 1 was that his conviction should be quashed and a permanent stay be granted. Nettle and Weinberg JJA rejected this ground, while Ashley JA would have allowed it. However a majority of the Court (Nettle & Ashley JJA) allowed the appeal on other grounds and ordered a re-trial. Weinberg JA would have refused leave to appeal.

Ashley JA concluded that, on an application of the approach adopted by "the balance of persuasion" in *The Queen v Glennon* (1992) 173 CLR 592 (Glennon), there should be a permanent stay. Nevertheless, his Honour considered that, there being no binding authority on the point, and in circumstances in which the "balance of persuasion" in *Glennon* had yet to be applied, he was not prepared to hold that the appellant could not ever be tried. The object of ensuring a fair trial was a vital consideration, but it was also vitally important that those who are charged with serious criminal offences be brought to trial. His Honour thought that the appropriate order was not to order a permanent stay, but to stay any proceeding against the appellant until further order of a judge of the Supreme Court or Court of Appeal.

Nettle JA agreed that the "balance of persuasion" in *Glennon* implied that the trial should have been permanently stayed because there was a significant likelihood that any conviction of the appellant would be affected by substantial prejudice. However, as the risk of prejudice had been brought about by media publicity, to grant a permanent stay would be to recognise that the media had a capacity to render an accused unable to be tried. His Honour did not consider that the Court should recognise that the media had that capacity. The social imperative that an accused be brought to trial surmounted the risk that he be exposed to the unfairness of prejudice. Weinberg JA doubted it would ever be appropriate to order a permanent stay on the basis of prejudicial media publicity to an accused.

The ground of appeal is:

- The Court of Appeal erred (a) in failing to find that the learned trial judge erred in not considering that there be a permanent stay of the appellant's trial; or, in the alternative, (b) in failing to order that the appellant's trial be stayed until further order.

MILLER & ASSOCIATES INSURANCE BROKING PTY LTD v BMW AUSTRALIA FINANCE LIMITED (M69/2009)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2009] VSCA 117

Date of judgment: 5 June 2009

Date application referred: 11 December 2009

The respondent ("BMW") is a financial institution involved in the business of insurance premium funding. The applicant ("Miller") is a firm of insurance brokers which, in September 2000, approached the respondent for a premium funding loan of $3,975,000 for its client, Consolidated Timber Holdings Ltd ("CTHL"). CTHL defaulted on repayment of the loan. BMW sued Miller for recovery of its loss, alleging misleading and deceptive conduct pursuant to ss 51A, 52 and 53 of the *Trade Practices Act* 1974 (Cth), breach of contract, and negligence. The essence of the alleged misrepresentation was that Miller represented to BMW that the nature of the insurance to be premium funded was cancellable property insurance (which would provide security for the loan) whereas in fact it was cost of production insurance, which was not cancellable. The misrepresentation was allegedly contained in a fax sent by Miller to BMW on 9 October 2000, which enclosed a copy of a certificate of insurance issued by HIH.

The trial judge (Byrne J) held that there was no misleading or deceptive conduct because the HIH certificate did not convey that the policy was cancellable; Miller had later provided a copy of the policy to BMW; and both parties being commercial adversaries and experienced, they should have sought and evaluated all relevant information. His Honour further found that Miller did not owe BMW a duty to exercise due care and skill in its dealings as a broker, and, in any event, the alleged breaches of duty were not made out.

The Court of Appeal (Neave JA and Robson AJA, Ashley JA dissenting) allowed BMW's appeal. The Court found that Miller's conduct was misleading because it was aware that policy cancellability was of central importance to a premium lender, and it was also aware that the HIH policy was a non-cancellable cost of production policy. The HIH certificate that was provided in response to a request from BMW for details of the insurance was ambiguous, in that it referred to "properties insured and limits", which suggested that the policy provided property insurance. Miller's silence about the true nature of the policy was misleading and deceptive. The majority further held that, although the approval of the loan by BMW without making proper enquiries about the nature of the policy was careless, there was insufficient evidence to refute the inference that BMW's loss was caused by Miller's misleading conduct.

Ashley JA dissented on the issue of causation. He considered, as the determination of that issue depended upon an assessment of the credibility of two employees of BMW who gave evidence at the trial regarding the circumstances in which the loan was made, the preferable course would be to remit the proceeding. However, if required to assess the issue on the basis of objective circumstances, his Honour stated his belief that the sequence of events tended very strongly in favour of a conclusion that the asserted belief of the two employees that the insurance was cancellable had nothing to with the loan being made.

At the hearing on 11 December 2009 the Court (Kiefel & Bell JJ) ordered that the application be referred for argument as if on appeal.

The questions of law said to justify a grant of special leave include:

- Was there any proper basis upon which Neave JA and Robson AJA could have interfered with the trial judge's demeanour-based findings of fact in relation to causation?

- In what circumstances can a representation which is, on its face, ambiguous, be misleading or deceptive?

STATE OF SOUTH AUSTRALIA v TOTANI & ANOR (A1/2010)

Court appealed from:	Full Court Supreme Court of South Australia [2009] SASC 301
Date of judgment:	25 September 2009
Date special leave granted:	12 February 2010

In December 2008 the South Australian Police Commissioner (the Commissioner) applied to the Attorney-General for a declaration under Part 2 of the *Serious and Organised Crime (Control) Act* 2008 (SA) (the Act) regarding the Finks Motorcycle Club Inc operating in South Australia. Section 10(1) of the Act provides:

If....the Attorney-General is satisfied that
a) members of the organisation associate for the purposes of organising, planning, facilitating, supporting or encouraging ion serious criminal activity
b) the organisation represents a risk to public safety and order in this state
the Attorney-General may make a declaration under this section in respect of an organisation

On 14 May 2009 the Attorney-General made the declaration. On 25 May the Commissioner applied ex parte to the Magistrates Court for a control order against the second respondent under s 14(1) of the Act, which provides:

The Court, must, on application by the Commissioner, make a control order against a person (the defendant) if the Court is satisfied that the defendant is a member of a declared organisation.

The Magistrates Court granted the control order, which provided that the second respondent (Hudson) was prohibited from associating with other persons who are members of declared organisations and possessing a dangerous article or prohibited weapon. On 26 May the respondents began proceedings in the Supreme Court, contending that s 14(1) of the Act impaired the institutional integrity of the Magistrates Court of South Australia, relying on the constitutional doctrine in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. They sought a declaration that Parts 2 and 3 of the Act (or in the alternative s 14(1) of the Act) were invalid. [The Commissioner also applied for a control order against the first respondent (Totani), but that application was stayed pending the determination of the Supreme Court proceedings]. Bleby J reserved the following questions for the consideration of the Full Court:

1. Is s 10(1) of the Act a valid law of the State of South Australia?
2. Is the declaration by the Attorney-General void and of no effect?
3. Is s 14(1) of the Act a valid law of the State of South Australia?
4. Is the control order in respect of Hudson made on 25 May 2009 void and of no effect?

A majority of the Full Court held that s 14(1) offended the *Kable* doctrine and answered the questions reserved as follows:

1. Not necessary to answer.
2. Not necessary to answer.
3. No.
4. Yes.

Bleby J (with whom Kelly J agreed) held that although the jurisdiction of the Magistrates Court to hear and determine an application under s 14(1) may have limited scope, the matters to be proved in that Court and the manner in which inquiries under ss 14 and 18 are to be conducted, are not incompatible with the proper discharge of judicial responsibilities or with the Court's institutional integrity. However he then determined that the function of the Court on an application under s 14(1) could not be considered in isolation from the other essential features of the Act. Bleby J concluded that the functions conferred by the Act on the Magistrates Court and on the Attorney-General were integrated or grafted onto one another so that the institutional integrity of the Court was impermissibly comprised. He found that in effect the Court is required to act as an instrument of the Executive. White J (dissenting) disagreed as to the relevance of the role of the Attorney-General, in the making of the declaration under s 10(1) of that Act, to the constitutional validity of the task required of the Magistrates Court. White J considered that the focus should be on the effect of the act on the character of the Magistrates Court and its ability to function independently and impartially. He concluded that here the Court was still required to exercise its own independent adjudicative role.

The questions of law said to justify the grant of special leave include:

- Whether the *Kable* doctrine is engaged by an exercise of judicial power involving proof of a fact where that fact is an executive determination arrived at by a process other than the judicial process.

- Whether and to what extent the *Kable* doctrine can serve as a restriction on the selection by the legislature of a fact, which, if established along with other facts in a judicial proceeding in a manner consistent with judicial process, triggers a particular legislative consequence.