HIGH COURT OF AUSTRALIA

SHORT PARTICULARS OF CASES
APPEALS

ADELAIDE SITTINGS – 10-12 MARCH 2015

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KING v PHILCOX (A26/2014)

Court appealed from: Full Court, Supreme Court of South Australia [2014] SASCFC 38

Date of judgment: 4 June 2014

Date special leave granted: 14 November 2014

On 12 April 2005, the respondent's brother, Scott Philcox, was a front seat passenger in a motor vehicle driven by the appellant, which was involved in a collision with another vehicle at an intersection at Campbelltown. The collision, which was caused by the negligence of the appellant, occurred between 4.50 and 4.55 pm. Scott Philcox died at about 5.30 pm while still trapped in the vehicle. On the afternoon of 12 April 2005, the respondent drove through or turned left at the intersection on five separate occasions after the collision. He was unaware that his brother was a passenger in one of the vehicles, and unaware that he had been fatally injured. Later that evening, the respondent's parents told him that his brother had been killed in a car accident. He then realised that this was the accident he had passed by on the five occasions. The respondent issued proceedings for damages in the District Court of South Australia, claiming that he was present at the scene of the collision and that, as a result, he suffered mental harm.

The trial judge (Judge Bampton) found that although the respondent had suffered a recognised psychiatric illness as the result of the sudden shock of hearing the news of his brother's death, and it was reasonably foreseeable that a person of normal fortitude in the respondent's position might suffer a psychiatric illness as a result of that shock, so that the duty of care specified in s 33 of the *Civil Liability Act* 1936 (SA) (the Act) applied, the respondent was not present at the scene of the accident when the accident occurred as required by s 53(1)(a) of the Act.

In his appeal to the Full Court of the Supreme Court (Gray, Sulan and Parker JJ), the respondent submitted, inter alia, that the trial judge erred in finding that the respondent was not present at the scene of the accident when the accident occurred. The Full Court held that the facts constituting a road accident and its aftermath are not confined to "the immediate point of impact", but include the aftermath of an accident which encompasses events at the scene after its occurrence, including the extraction and removal of persons from damaged vehicles. The Court noted that section 3 of the Act defines the word "accident" and the words "motor accident" as follows:

> *"accident* means an incident out of which personal injury arises and includes a motor accident;
> *motor accident* means an incident in which personal injury is caused by or arises out of the use of a motor vehicle."

The Court considered that the use of the word "incident" encompasses events directly related to and following on from the actual impact. The use of the phrase "is caused by or arises out of" confirms this construction. They were therefore satisfied that the respondent was "*present at the scene of the accident when the accident occurred*" within the meaning of s 53(1)(a) of the Act.

The grounds of appeal include:

- The Full Court erred in finding that the existence of a duty of care was determined solely by reference to s 33(1) of the *Civil Liability Act* 1936 (SA).

- The Full Court erred in finding that a reasonable person in the position of the appellant would have foreseen that a person of normal fortitude in the respondent's position might, in the circumstances of the case, have suffered psychiatric illness, within the meaning of s 33(1) of the *Civil Liability Act* 1936 (SA).

LINDSAY v THE QUEEN (A24/2014)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia [2014] SASCFC 56

Date of judgment: 3 June 2014

Date special leave granted: 14 November 2014

On 15 August 2013 the appellant was convicted of the murder of Andrew Negre, and sentenced to life imprisonment with a 23 year non-parole period. The circumstances of the offence were that the appellant met Negre at a hotel on 31 March 2011 and invited him to his home for further drinks. There Negre made two homosexual advances toward the appellant. After the first advance, the appellant warned that violence would follow if he continued with such suggestions. The prosecution case was that the appellant attacked and killed Negre with a knife after he made a further advance. The primary line of defence was that it was the co-accused who committed the attack whilst the appellant was elsewhere in the house. The secondary line of defence was that the partial defence of provocation was not negated and that a verdict of manslaughter should have been returned.

In his appeal to the Court of Criminal Appeal (Kourakis CJ, Gray and Peek JJ) the appellant argued that the trial judge's directions on provocation were incorrect or inadequate. The Court found that the judge's directions were inadequate in that they did not address the distinction within the objective test as between the matter of the gravity of the provocation (where the traits of the accused must be taken into account) and the matter of loss of self-control (where the traits of the accused, apart from age, must not be taken into account).

The Court found that the judge also erred in suggesting that the jurors should proceed to consider the objective test by putting themselves in the appellant's position. This gave rise to a risk that the jurors might thereby substitute their own (potentially high) subjective standards for those of the objective "ordinary person". The judge also failed adequately to direct that if the jury rejected the primary defence, they could take the appellant's intoxication, the co-accused's evidence, and the ferocity and immediacy of the attack into account when determining whether he actually lost self-control, and that neither anger nor an intention to kill were inconsistent with the partial defence of provocation.

The Full Court then considered whether the issue of provocation should have been left to the jury, and whether it should apply the proviso even though the directions as to the partial defence of provocation were erroneous. The Court noted that there was no doubt that in former times, when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour, a killing under the provocation present in this case would have been seen as giving rise to a verdict of manslaughter rather than murder. However, after consideration of the authorities, and of some of the extensive academic literature, the Court concluded that in twenty–first century Australia, the evidence taken at its highest in favour of the appellant in this case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the deceased in the manner that the appellant did. Accordingly, the judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case.

The appellant was not prejudiced by the fact that prosecution counsel did not rely on the proviso in his outline of argument. Experienced criminal appellate counsel should be aware that it is not unlikely that the proviso will be raised in cases such as this. It was made clear during the hearing of this appeal that resort to the proviso was under consideration and no application for an adjournment or the opportunity to supply written submissions on the topic was made. Having regard to the great strength of the prosecution evidence on the charge of murder, and making full allowance in favour of the appellant for the fact that defence counsel, knowing manslaughter would not be left to the jury would entirely devote attention to the primary defence, the Court considered that a conviction of murder was inevitable. It therefore applied the proviso and dismissed the appeal.

The grounds of appeal include:

- The Court of Criminal Appeal ('CCA') erred in dismissing the appeal by applying the "proviso" to s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) on the footing that although the trial judge erred in his directions respecting provocation, he also erred in not withdrawing provocation from the jury's consideration, in that:

  (1) the judge was correct to leave provocation to the jury;

  (2) the CCA's reasons for concluding to the contrary relied in part upon academic literature relevant to contemporary standards which was irrelevant and which was not identified to the parties and upon which the appellant had no opportunity to make submissions.

SELIG & ANOR v WEALTHSURE PTY LTD & ORS (A25/2014)

Court appealed from: Full Court, Federal Court of Australia
[2014] FCAFC 64; [2014] FCAFC 76

Date of judgment: 30 May 2014; 26 June 2014

Date special leave granted: 14 November 2014

In 2004 and 2005, the appellants ('the Seligs') acted on the financial advice of the second respondent, David Bertram ('Bertram'), and invested $450,000 in Neovest Ltd. The investment failed. At the time the advice was given, Bertram was an authorised representative of the first respondent ('Wealthsure'). The Seligs claimed damages for the loss of their investment and consequential losses against a number of defendants including Wealthsure and Bertram. They relied on statutory and common law causes of action including breaches of ss 945A and 945B of the *Corporations Act* 2001(Cth); misleading and deceptive conduct in relation to a financial product or a financial service, contrary to s 1041H of the *Corporations Act*; false or misleading statements to induce a person to apply for, acquire or dispose of financial products, contrary to s 1041E of that Act; and breaches of the contract of retainer and negligence.

The primary judge (Lander J) entered judgment for the Seligs against Wealthsure, Bertram and two other defendants in the sum of $1,760,512. His Honour found that the Seligs had been contributorily negligent to the extent of 15%, but he held that the damages should not be reduced for contributory negligence. The judge also held that the proportionate liability provisions in ss 1041L and 1041N of the *Corporations Act* applied only to the claim brought by the Seligs under s 1041H. As they had succeeded on other claims, he made no declarations as to apportionment.

Wealthsure and Bertram appealed to the Full Court of the Federal Court (Mansfield, Besanko and White JJ). They contended, inter alia, that all of the Seligs' claims in respect of the same loss and damage comprised "a single apportionable claim" as contemplated by s 1041L(2) of the Corporations Act and, accordingly, were "apportionable" for the purposes of s 1041N of the Act; therefore the primary judge should have entered judgment against them only to the extent of their proportionate responsibility.

Mansfield J (with whom Besanko J concurred on this issue) noted that s 1041L(4) confines apportionable claims to claims for that type of loss caused by conduct in contravention of s 1041H. Section 1041N then provides that in any proceedings involving an apportionable claim, the liability of a defendant who is a concurrent wrongdoer in relation to that claim is to be apportioned. His Honour considered that those provisions tended to indicate that the appropriate focus is upon whether the claim or claims made in a particular matter are in respect of the same loss or damage. The focus is upon the nature of the loss or damage for which relief is sought, rather than upon the nature of the cause of action or causes of action which give rise to the entitlement to that loss or damage. The combination of ss 1041L(2) & (3) indicates a legislative intention that an apportionable claim is one where a claim for damages for economic loss caused by a contravention of s 1041H succeeds. Even if there is a separate cause or other causes of action which has or have caused the same damage, the claim maintains its character as an apportionable claim. In the present case, the findings that each group of

defendants at trial contravened s 1041H, and that each group of defendants' conduct contributed to the same loss and damage suffered by the Seligs, was sufficient to determine that the claim or claims against them each was an apportionable claim notwithstanding that the causes of action giving rise to that loss and damage extended beyond the contraventions of s 1041H(1).

White J (dissenting on this point) found the issue was really that of whether the expression "the claim for the loss and damage is based on more than one cause of action (whether or not of the same or a different kind)" in s 1041L(2) refers only to causes of action which are themselves apportionable claims or, alternatively, to causes of action more generally. His Honour concluded that the former was the proper construction. The text of the subsection was suggestive of a legislative intention that claims which are themselves apportionable claims are, in the stipulated circumstance, to be regarded as a single claim. This construction of subs (2) was confirmed by s 1041L(4) which expressly limits apportionable claims to those claims specified in subs (1).

A number of respondents have either filed no appearance or a submitting appearance. The only active respondents are Wealthsure and Bertram and the 3rd to 5th respondents.

The grounds of appeal are:

- The Full Court erred in law as to the interpretation and application of ss 1041H-1041S of the *Corporations Act* and as a result wrongly held that the plaintiffs' claims were apportionable.

- The Full Court erred in its interpretation of ss 1041I (1B). The subsection provides that damages are to be reduced by reference to the claimants' share in the responsibility for the loss or damage in respect of claims brought under s 1041H but not otherwise. The Full Court should have held that the appellants' claims were not to be reduced by reference to contributory negligence.