SHORT PARTICULARS OF CASES
MATTERS TO BE HEARD BY THE FULL COURT

JUNE 2015

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McCLOY & ORS v STATE OF NEW SOUTH WALES & ANOR (S211/2014)

Date writ of summons filed: 28 July 2014

Date special case referred to Full Court: 28 January 2015

Part 6 of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) ("the Act") regulates political donations and electoral expenditure in relation to the Parliament and the local councils of New South Wales. Division 2A of Part 6 of the Act imposes caps on political donations in relation to State elections and makes it unlawful for anyone to accept a donation that exceeds a prescribed cap. Division 4A of Part 6 of the Act prohibits the making of political donations by certain classes of person. Those classes include property developers. Section 96E (in Part 4 of the Act) prohibits the making of certain indirect campaign contributions, such as payments for advertising and the provision of equipment in return for inadequate payment.

The first plaintiff, Mr Jeffery McCloy is or was a director of both the second plaintiff, McCloy Administration Pty Ltd and the third plaintiff, North Lakes Pty Ltd. Both the third plaintiff and Mr McCloy are "property developers" for the purposes of Division 4A of Part 6 of the Act.

Mr McCloy made donations in excess of $31,500 for the benefit of candidates in the New South Wales state election ("NSW election") held in March 2011. The second plaintiff made an indirect contribution of $9,975.00 to the election campaign of Mr Tim Owen, a candidate for the seat of Newcastle in the Legislative Assembly in the NSW election. At the time the plaintiffs commenced proceedings in this Court (in July 2014) they each intended to make donations to the Liberal Party of Australia or to other political parties.

The proceedings brought by the plaintiffs in this Court challenge the validity of s 96E and Divisions 2A and 4A of Part 6 of the Act. This is on the basis that at least some of the relevant provisions impermissibly infringe the freedom of communication on political or governmental matters implied in the Commonwealth Constitution.

The plaintiffs have filed a Notice of a Constitutional Matter (and an Amended Notice). The Attorneys-General of the Commonwealth and the States of Victoria, Queensland, Western Australia and South Australia are intervening in the proceedings.

The parties filed a Special Case, which Justice Gageler referred for consideration by the Full Court. The Special Case states the following questions for the opinion of the Full Court:

1. Is Division 4A of Part 6 of the Act invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication of governmental and political matters contrary to the Commonwealth Constitution?

2. Is Division 2A of Part 6 of the Act invalid (in whole or in part and, if in part, to what extent) in its application to the plaintiffs because it impermissibly

burdens the implied freedom of communication on governmental and political matters contrary to the Commonwealth Constitution?

3. Is s 96E of the Act invalid in its application to the plaintiffs because it impermissibly burdens the implied freedom of communication on governmental and political matters contrary to the Commonwealth Constitution?

4. Who should pay the costs of the special case?

SMITH v THE QUEEN (B18/2015)

Court appealed from: Supreme Court of Queensland (Court of Appeal) [2014] QCA 277

Date of judgment: 7 November 2014

Special leave granted: 17 April 2015

On 24 February 2014 the Appellant was convicted of rape following a jury's majority verdict (in circumstances where it could not reach a consensus and was given a *Black* direction). He was later sentenced to five years imprisonment, which was suspended after two and a half years. The Appellant appealed on the ground that his conviction was "unsafe and unsatisfactory".

The events which formed the subject of the charge occurred in 1989. (The Appellant however was not formally charged until March 2011 because the Complainant did not make a complaint to the police until 2007.) As the Appellant admitted during his trial that sexual intercourse had in fact occurred, the jury was only required to determine the issues of consent and the possibility of mistake.

At 11:14am on Friday 21 February 2014 the jury retired to consider its verdict, with the Court later adjourning until the following Monday morning. At 12:31pm on Monday 24 February 2014, the jury returned to Court for re-directions before again resuming its deliberations. Two hours later it advised the Court that it could not reach a consensus. It was then given a *Black* direction, before retiring once more to consider its verdict.

At 4:20pm another note was received in which the jury said that it was having difficulty in agreeing. The trial judge then advised the parties' counsel that that note disclosed the members' voting pattern, which he did not intend to reveal. He then observed that, due to the time that had passed without a unanimous verdict, it was open for the jury to seek a majority guilty verdict.

At 4:25pm the trial judge asked the jury whether a majority verdict, as agreed by 11 of its number, might resolve the impasse. The jury then retired afresh, returning 20 minutes later with a majority verdict.

The Appellant appealed on the ground that, having received the jury note containing the jury's voting pattern, the trial judge erred in:

(a) not discharging the jury of his own motion;
(b) determining the "prescribed period" under s 59A(6)(b) of the *Jury Act* 1995 (Qld) ("the Jury Act"); and
(c) in asking the jury to reach a majority verdict under s 59A(2) of the Jury Act without disclosing the jury's voting pattern to the Appellant.

The Court of Appeal (Holmes JA, Philippides and Dalton JJ) unanimously dismissed the Appellant's appeal. In relation to the majority verdict, the Court relevantly agreed that failure to disclose the voting figures had no relevance to the judge's determination of the prescribed period for the purpose of s 59A(6) of the Jury Act. The Court also found that there was no denial of procedural fairness to the Appellant in not disclosing the jury's voting numbers before exercising the

discretion to ask the jury to reach a majority verdict. Nor was there any need for the trial judge to discharge the jury simply because he did not propose to make the disclosure.

The grounds of appeal are:

- The Court of Appeal erred in concluding that:

    a) The voting information in the jury's note to the trial judge was neither relevant nor capable of influencing the trial judge's exercise of discretion to permit a majority verdict;

    b) There was no denial of procedural fairness to the applicant by the trial judge in not disclosing to his counsel the jury's voting numbers before exercising the discretion to ask the jury to reach a majority verdict;

    c) There was no need for the trial judge to discharge the jury if he did not propose to disclose the voting information.

D'ARCY v MYRIAD GENETICS INC & ANOR (S28/2015)

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 115

Date of judgment: 5 September 2014

Special leave granted: 13 February 2015

The First Respondent ("Myriad") owns Australian Patent Number 686004 ("the Patent"). The Patent is over the invention of certain methods of detecting the gene BRCA1 and of using components and mutations of that gene in the diagnosis of predisposition to breast cancer and ovarian cancer.

The Patent has 30 different claims, the validity of three of which ("the disputed claims") was challenged by Ms Yvonne D'Arcy in the Federal Court. This was on the basis that the disputed claims involved naturally occurring nucleic acids that had merely been isolated, without a "manner of manufacture" as required by s 18(1)(a) of the *Patents Act* 1990 (Cth) ("the Act").

On 15 February 2013 Justice Nicholas dismissed Ms D'Arcy's application. His Honour found that the disputed claims pertained not to nucleic acids as they existed within human cells but to nucleic acids which had been extracted from such cells and purged of associated biological materials. Justice Nicholas held that each of the claims was to a "manner of manufacture" as that expression had come to be understood in Australian patent law.

On 5 September 2014 the Full Court of the Federal Court (Allsop CJ, Dowsett, Kenny, Bennett & Middleton JJ) unanimously dismissed Ms D'Arcy's appeal. Their Honours found that the isolated nucleic acids, as described in the disputed claims, were chemically and functionally different from those which occurred in nature. Only once those acids had been isolated could they be used for the described comparison with tables of coding (which had resulted from extensive epidemiological research) to determine the presence of any mutations in BRCA1 polypeptides that would indicate a likelihood of cancer. The Full Court held that the isolated nucleic acids resulted in an artificially created state of affairs for economic benefit and that accordingly the disputed claims involved a "manner of manufacture" within the meaning of the Act.

On 13 March 2015 the Institute of Patent and Trade Mark Attorneys filed a summons, seeking leave to intervene as amicus curiae in this proceeding. On 31 March 2015 it also filed a notice of a constitutional matter. The Attorney-General of the Commonwealth has intervened in this matter.

The grounds of appeal include:

- The Full Court erred in holding that the isolation of the nucleic acid was sufficient to render the claims as being claims to an "artificially created state of affairs for economic benefit" and hence to a manner of manufacture.

COREY FULLER-LYONS BY HIS TUTOR NITA LYONS v STATE OF NEW SOUTH WALES (S81/2015)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 424

Date of judgment: 9 December 2014

Special leave granted: 17 April 1015

On 29 January 2001 Corey Fuller-Lyons, aged eight at the time, and his two brothers (aged 11 and 15) boarded an intercity train in Sydney that was bound for Newcastle. They travelled in the front carriage. A few minutes after the train had left Morisset station, and while it was travelling at approximately 100 km/h, Corey fell from it and was severely injured. Corey's brothers later noticed that Corey was missing but they did not see his accident.

When such trains were stationary at a platform, any open doors were normally closed and locked by a mechanism activated by a guard travelling in the rear carriage. At Morisset station, the curvature of the platform was such that a train guard could not see the front carriage. The guard however would rely upon a station assistant's "all clear" signal to activate the door-closing mechanism before the train departed. The forward doors of the carriage on which Corey travelled were later found to have been interfered with during the journey to Newcastle but they were nevertheless able to close and lock sufficiently.

Corey sued the Respondent ("the State") in negligence. At the trial, there was evidence that if a pair of train doors was not fully closed, an eight-year-old boy with his back to one of the doors might be able to push the other door far enough for him to pass through the gap. (Due to Corey's cognitive impairment, his evidence was given no weight in respect of his fall from the train.)

On 11 April 2014 Justice Beech-Jones awarded Corey more than $1.5 million in damages. His Honour found that when the train left Morisset station, Corey's torso was probably between the front left doors (perhaps because Corey had interfered with them). Corey would then have forced the doors a little further apart before falling out of the train as it rounded a bend to the right. Justice Beech-Jones found that the station attendant at Morisset had negligently failed to see Corey's arm and/or leg protruding from the train when it departed. His Honour also found no contributory negligence on the part of Corey.

An appeal by the State was unanimously allowed by the Court of Appeal (McColl & Macfarlan JJA, Sackville AJA). Their Honours held that the finding of negligence could not stand, as other possible scenarios (involving no failure on the part of the station attendant) were not less likely than the one found by Justice Beech-Jones. Those scenarios included Corey's torso being between the doors with no protruding limb visible to the station attendant. They also included the doors having been wedged apart by an object such as a bag, a bottle or a large ball. The Court of Appeal found no reason to suppose that such an object was not available to Corey, who bore the onus of proving that the scenario favourable to his claim was the most probable one.

The grounds of appeal include:

- There was no basis upon which the Court of Appeal could set aside the trial judge's finding of fact.

- The Court of Appeal erred in treating the trial judge's findings of fact as "impermissible conjecture or speculation".

- The reasoning of the Court of Appeal contrasted facts actually found on the evidence with possibilities for which there was no evidence and reasoned by that means that the Appellant had failed to prove his case.