

SHORT PARTICULARS OF CASES
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**ATTORNEY-GENERAL FOR THE STATE OF TASMANIA v
CASIMATY & ANOR (H3/2023)**

Court appealed from: Full Court of the Supreme Court of Tasmania
[2023] TASFC 2

Date of judgment: 4 May 2023

Special leave granted: 13 October 2023

On the Tasman Highway near Hobart Airport there is a busy junction where three roads meet. Some years ago, the Tasmanian Government's Department of State Growth decided that a new interchange should be developed and built at the junction. Plans and drawings were prepared and submitted for consideration by the Parliamentary Standing Committee on Public Works ("the Committee") pursuant to the *Public Works Committee Act 1914* (Tas) ("the PWC Act"). The Committee considered and reported on the proposal in late 2017. The department subsequently engaged the second respondent ("Hazell") to carry out the construction work of the interchange. The first respondent ("Casimaty") claims to have an interest in a piece of land on one of those roads. Casimaty brought an action against Hazell seeking: (i) a declaration that the works were works to which sections 15 and 16 of the PWC Act apply, and (ii) an injunction restraining Hazell from undertaking the works. Casimaty claimed that the works Hazell was to perform were not the same as the public works considered and reported upon by the Committee. The Attorney-General for the State of Tasmania (the appellant) was joined as a party to the action and made an interlocutory application to have the action dismissed (or alternatively that substantial parts of the amended statement of claim be struck out). This was on the basis that: a) the amended statement of claim did not disclose any reasonable cause of action because it did not disclose any justiciable issue, and b) that parts of the amended statement of claim offended the principle that parliamentary proceedings are absolutely privileged. Hazell did not wish to be heard on the interlocutory application.

The primary judge found that the cause of action could not proceed without adjudicating upon the Committee's 2017 report and the response of the Governor and the Committee to the obligations imposed upon them by the PWC Act, in order to determine whether Hazell's works were so different to those contemplated by the Committee's report. His Honour held that adjudicating on those matters would contravene Article 9 of the *Bill of Rights 1688* and was therefore not permitted. Article 9 provides: "*That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*". The claim was struck out and the action dismissed.

On appeal, the Full Court (Pearce & Brett JJ, Geason J dissenting) found that the appellant's interlocutory application was misconceived, set aside the primary judge's order and dismissed the interlocutory application. While the Full Court agreed with the primary judge that the proceedings would require consideration of the 2017 report, the Court held that proof of the report and underlying documents for the purpose of that comparison did not infringe parliamentary privilege.

The grounds of appeal are:

- The Full Court erred in construing s 15 and s 16 of the *Public Works Committee Act 1914* (Tas) as creating a public obligation which falls outside the parliamentary process and hence the ambit of parliamentary privilege and which, by implication, is subject to the protection and enforcement of the courts.
- The Full Court ought to have concluded that the Primary Judge was correct in finding that it would infringe parliamentary privilege for the Court to determine whether road works complied with s 16(1) of the PWC Act by adjudicating upon whether the road works that Hazell Bros Group Pty Ltd were engaged to undertake were different from the road works reported on by the Parliamentary Standing Committee on Public Works established by the PWC Act.

The Attorney-General of the Commonwealth, the Attorney-General for the State of South Australia and the Attorney-General for the Australian Capital Territory have each been granted leave to intervene to make both written and oral submissions in the appeal.

**WILLIAMS & ANOR v TOYOTA MOTOR CORPORATION
AUSTRALIA LIMITED (ACN 009 686 097) (S157/2023);
TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED
(ACN 009 686 097) v WILLIAMS & ANOR (S155/2023)**

Court appealed from: Full Court of the Federal Court of Australia
[2023] FCAFC 50

Date of judgment: 27 March 2023

Special leave granted: 17 November 2023

Representative proceedings were brought by the Williams parties under Part IVA of the *Federal Court of Australia Act 1976* (Cth) and concern some 264,000 new and used Toyota vehicles with diesel engines sold between October 2015 and April 2020 (the relevant period). Each relevant vehicle was defective at the time of supply because of a common flaw in the design of the diesel exhaust after-treatment system. The underlying dispute concerns the supply of defective motor vehicles in contravention of the statutory guarantees of acceptable quality in section 54 of the *Australian Consumer Law* (“the ACL”). Both appeals in this Court concern the proper construction of s 272(1)(a) of the ACL, which describes the damages which an affected person is entitled to recover in an action for damages under s 271 against a manufacturer of goods for breach of (in this case) s 52.

After a series of unsuccessful attempts to fix the vehicle defects, Toyota introduced a solution in May 2020 (i.e. after the relevant period). This solution, known as the “2020 field fix”, was offered to all group members at no cost. It was common ground that the 2020 field fix was effective in remedying the defects and their consequences in all the vehicles. Consequently, there was no ongoing reduction in the value of the relevant vehicles from the time the 2020 field fix was made available.

The 2020 field fix was available by the time of the initial trial in the Federal Court. The Williams parties sought aggregate damages for reduction in value resulting from the failure by Toyota to comply with the consumer guarantees under s 54. No such award was sought in respect of those group members who had taken up the 2020 field fix. Thus, the primary judge focused on the claim for reduction in value made by those group members who had bought their vehicles from a Toyota dealer and who still owned the vehicle when the 2020 field fix was made available. The primary judge accepted the Williams parties’ contention that the reduction in value was to be assessed by reference to the time when the vehicle was supplied without any reference to the subsequent events (with only information which bore upon the assessment of the value at the time of supply being able to be taken into account); the development of the 2020 field fix was not relevant to the true value at the time of supply. The primary judge concluded that reduction in value damages be assessed on a common basis, because the assessment was based on a propensity common to all the vehicles owned by those within the relevant cohort at the time of acquisition. The primary judge determined that the failure to comply with s 54 resulted in a reduction in value of 17.5%. The primary judge rejected Toyota’s submission that the damages should be reduced because of the availability of the 2020 field fix and any failure to obtain that repair.

On appeal to the Full Court, Toyota contended that the time of assessment of any damages was at the time the damages crystallised: e.g. upon sale of a vehicle. The Williams parties supported the approach of the primary judge. The Full Court followed neither party's approach and determined that the damages were to be calculated by deducting the value of the defective product from the lower of the original purchase price or the average retail price at the time of supply, but held that there was an overarching consideration that the amount of compensation be appropriate in a particular case. The Full Court held that it was appropriate to factor in the availability of the 2020 field fix when determining the reduction in value at the time of purchase. The Court concluded that it was appropriate to remit the matter for re-assessment on the basis that the reduction in value before taking into account the availability of the 2020 field fix was 10%, with the aspect to be determined being what allowance should be made for the 2020 field fix.

In this Court, the Williams parties challenge whether the Full Court erred in reducing the primary judge's assessment of a 17.5% reduction in value and in its re-assessment of the reduction in value.

The grounds of appeal in the Williams appeal are:

- The Full Court erred in construing s 272 of the *Australian Consumer Law* (ACL) by:
 - (a) failing to find that in the context of a claim for non-compliance with the guarantee in s 54 the "reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates ..." is *always* to be assessed by reference to the true value of the goods as at the time of the supply of the goods, using information acquired after supply only as hindsight confirming a foresight; and
 - (b) finding that the use of the term "damages" in those provisions imports a discretion, exercisable under a standard of "appropriateness", to assess the reduction in the value of the goods at some later time (up to and including the time of judgment) or make an "adjustment" downwards to the amount of damages to which an affected person otherwise would be entitled under the statutory formula in s 272(1)(a) to reflect a future event unknown and unknowable at the date of supply: (FC [99], [129]-[134]).
- The Full Court erred in finding error in the primary judge's assessment of a 17.5% reduction in value of the Relevant Vehicles and in its re-assessment of the reduction in value:
 - (a) consequent upon the errors in Ground 1 above;
 - (b) in understanding the primary judge as failing to have regard to the possibility, as at the time of supply, that a repair for the defect might become available (FC [81], [133]);
 - (c) in understanding the primary judge to have placed substantial and unqualified reliance on the expert valuation evidence of Mr Cuthbert (FC [203], [204], [294], [295]); and
 - (d) in failing to accord weight to the primary judge's advantages in assessing value.

Toyota does not challenge the Full Court finding that the reduction was 10% before considering the availability of the 2020 field fix. Toyota challenges the Full Court order remitting the matter for reduction in value damages to be assessed in accordance with the Full Court's reasons. The ground of appeal in the Toyota appeal is:

- The Full Court erred by determining that upon a proper construction of s 272(1)(a) of the *Australian Consumer Law* (as contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) damages for reduction in value of relevant motor vehicles (not including any vehicle purchased by a consumer and then sold by that consumer within the relevant period) resulting from a failure to comply with the guarantee of acceptable quality are recoverable when there was no ongoing reduction in value at the time of trial due to the availability of a repair free of charge.

CAPIC v FORD MOTOR COMPANY OF AUSTRALIA PTY LTD
ACN 004 116 223 (S25/2024)

Court appealed from: Full Court of the Federal Court of Australia
[2023] FCAFC 179

Date of judgment: 14 November 2023

Special leave granted: 13 February 2024

This proceeding is a representative proceeding brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth) and concerns over 73,000 new Ford vehicles sold between September 2010 and December 2017 with a dry, dual-clutch transmission (“DPS6”). The vehicles were described as economical entry-level vehicles. The group members are purchasers of new vehicles, together with subsequent secondhand purchasers between January 2011 and November 2018. The underlying dispute concerns the supply of defective motor vehicles in contravention of the statutory guarantees of acceptable quality in section 54 of the *Australian Consumer Law* (“the ACL”). There were said to be both component deficiencies which gave rise to a propensity for, or real risk of, the affected vehicles experiencing certain behaviours, and architecture deficiencies which exacerbated the risk or propensity of the component deficiencies.

The appeal in this Court concerns the proper construction of ss 272(1) and (1)(a) of the ACL, which entitle an affected person to recover damages for any reduction in the value of the goods resulting from the failure to comply with the guarantee under s 54 of the ACL. In the appellant’s case the risks had in fact manifested in her vehicle, but while the propensity was there, the behaviours need not necessarily have manifested for all group members. At the time of supply, no fix existed for any of the deficiencies. After supply, in a piecemeal fashion spanning many years, fixes were developed for some, but not all, of the deficiencies and applied to the appellant’s car. By the time of trial fewer deficiencies were present but some persisted and were not shown to be capable of remedy. The appellant’s individual damages had been assessed at first instance, but the question of group members’ damages has not yet been determined at first instance.

The primary judge found the value of the appellant’s vehicle to be reduced by 30% from the purchase price. In assessing damages, the primary judge did not rely on the valuation evidence provided by either side. The judge held that the reduction in value was to be assessed by reference to the value of the vehicle at the time of supply when the defects were risks not actualities, without regard to whether the risks had come to pass or whether components had been successfully repaired.

The respondent (Ford) appealed and the appellant cross-appealed to the Full Court. At issue in the appeal was the identification of the relevant information known at trial which is to be taken into account in assessing whether the guarantee of acceptable quality has been met. The Full Court applied what it regarded as the construction of s 272 of the ACL adopted by a differently constituted Full Court in *Toyota Motor Corporation v Williams*. The Full Court determined that the primary judge had failed to take into account the fact of certain repairs to the vehicle done at no cost to the appellant, the value of her vehicle at the time of trial and her use of the vehicle up to the time of trial. The Full Court ordered that the question of damages be remitted to the primary judge for re-determination on the basis of the evidence already before him.

The grounds of appeal are:

- The Full Court erred in construing s 272(1)(a) of the *Australian Consumer Law* (ACL) as subject to a qualification that the assessment of damages under that paragraph may require, depending on the circumstances of the case, (i) a departure from assessment at the time of supply, or (ii) an adjustment to avoid “over-compensation”: FC [307]; see also [306], [308], [310], [314].
- In circumstances where the relevant “failure to comply” with a statutory guarantee arose from an unacceptable risk of the good behaving unacceptably (i.e., in a propensity case), the Full Court erred in finding that, in order to avoid “overcompensation”, s 272(1)(a) of the ACL requires damages to be assessed having regard to:
 - a. whether the risk has in fact come to pass post supply (FC [315(1)], upholding an appeal to [884] of the primary judgment (*Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715 (PJ));
 - b. whether repairs were applied to the good at no cost to the claimant and the claimant’s use of the vehicle up until the time of trial (FC [315(2)]; cf PJ [884]-[886]); and
 - c. the value of the good at the time of trial (FC [315(3)]; cf PJ [880]-[881]).

The respondent has filed a notice of contention with the following ground:

- In response to Ground 2 of the Notice of Appeal, the ultimate conclusions of the Court below should be affirmed because in assessing reduction in value damages under s 271(1)(a) of the *Australian Consumer Law*, it is appropriate to have regard to the performance of the good after supply.

This matter is being heard immediately after the appeals in *Williams & Anor v Toyota Motor Corporation Australia Limited (ACN 009 686 097) (S157/2023)* and *Toyota Motor Corporation Australia Limited (ACN 009 686 097) v Williams & Anor (S155/2023)*.

CBI CONSTRUCTORS PTY LTD & ANOR v CHEVRON AUSTRALIA PTY LTD (P22/2023)

Court appealed from: Supreme Court of Western Australia
Court of Appeal
[2023] WASCA 1

Date of judgment: 17 January 2023

Special leave granted: 17 November 2023

The appellants (together, CKJV) commenced arbitration proceedings against the respondent (Chevron). The arbitration arose from a contract in relation to an offshore oil and gas project known as the Gorgon Project (“the Contract”). Under the Contract, CKJV were required to provide “Staff” to carry out work at certain construction sites, and Chevron was required to reimburse CKJV for the costs of providing Staff. In broad terms, CKJV contended that Chevron owed it more money than Chevron had paid, while Chevron contended by way of counterclaim that it had overpaid CKJV.

Chevron contended that in respect of Staff, CKJV was only entitled to recover costs actually incurred, whereas CKJV contended that it was entitled to recover costs on the basis of contractual “Rates”, rather than actual costs incurred (“the Contract Criteria Case”). CKJV put its case on the bases that: a) the parties had varied or amended the Contract to convert its entitlement from a Cost-based remuneration to Rates-based remuneration, or b) Chevron was estopped from contending that CKJV was not entitled to Rates-based remuneration. CKJV raised an alternative case in effect that even if it was only entitled to actual costs incurred for Staff as alleged by Chevron, it was nevertheless entitled to set-off, against the amounts claimed by Chevron, actual costs incurred for which it had not yet billed Chevron. In response to that alternative case, Chevron alleged that a subsequent agreement between the parties, referred to as the “Letter of Agreement”, on its proper construction, precluded CKJV from raising such offsets.

An arbitral award in favour of CKJV was made on 4 September 2020, under the *Commercial Arbitration Act 2012* (WA) (“the Act”). The award was the second of two interim awards. The first interim award, made on 14 December 2018, related to issues of liability in accordance with earlier interlocutory arbitral orders. By majority, the arbitral tribunal rejected each of Chevron’s objections and declared that CKJV was not precluded from advancing the Contract Criteria Case by any of the estoppels, and that the tribunal was not *functus officio* in respect of the Contract Criteria Case.

Chevron applied under section 34(2)(a)(iii) of the Act to set aside the second award, relying on the ground that the award was beyond the scope of the parties’ submissions to arbitration within the meaning of s 34(2)(a)(iii) of the Act. The primary judge upheld Chevron’s application. CKJV unsuccessfully appealed to the Court of Appeal.

The grounds of appeal are:

- The Court of Appeal erred in law in finding that the arbitral tribunal was *functus officio* with respect to CKJV’s Contract Criteria Case for the purpose of s 34(2)(a)(iii) of the *Commercial Arbitration Act 2012* (WA), since:

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- (a) the Tribunal's contrary view was based on findings that there had been no final determination of that case (so as to found an issue estoppel or *res judicata*);
 - (b) those findings were as to the admissibility of the claim not the jurisdiction of the Tribunal;
 - (c) the decision of the Court of Appeal involved a rejection of those findings, and so was outside the power of the Court to set aside an arbitral award under s 34(2)(a)(iii) of the Act.
- In circumstances where the scope of the parties' submission to arbitration turns on a construction of the procedural orders issued by the arbitral tribunal itself and the procedural context in which those orders were made, the Court of Appeal erred in law in finding that the standard of the supervisory court's review of the scope of the parties' submission to arbitration in an application to set aside an arbitral award under s 34(2)(a)(iii) of the Act is a *de novo* review in which the supervisory court applies a "correctness" standard of intervention. The Court ought to have found that the standard of review in those circumstances is one of absolute, or alternatively substantial, deference to an arbitral tribunal's decision as to the scope of the parties' submission to arbitration.

ASF17 v COMMONWEALTH OF AUSTRALIA (P7/2024)

Cause removed from: Federal Court of Australia
(Appeal from [2024] FCA 7)

Date cause removed: 16 February 2024

The appellant is a citizen of Iran and has been detained under the *Migration Act 1958* (Cth) for over 10 years. He is bisexual, and the Commonwealth accepts that sexual intercourse between males in Iran is illegal and can attract the death penalty. The appellant has not volunteered to assist the Commonwealth with his removal to Iran. He has never objected to being removed from Australia to any other place in the world and has positively asked for this. The Commonwealth has not sought to remove the appellant to any place other than Iran and continues to detain him on the speculative contingency that he might change his mind and acquiesce in, or positively assist with, his removal to Iran.

On 16 November 2023, the appellant applied to the Federal Court for a writ of *habeas corpus*. His application was dismissed on 11 January 2024. Central to that determination was the issue of the constitutional lawfulness of executive detention, which this Court confirmed in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (“*NZYQ*”) (where orders were made on 8 November 2023, with reasons published on 28 November 2023). This Court held that the constitutionally permissible period of detention comes to an end when there is no real prospect of removal becoming practicable in the reasonably foreseeable future. The Commonwealth’s contention was that the appellant could be removed to Iran with his co-operation and for that reason the constitutional limitation had not been reached. The appellant accepted that if he co-operated by taking certain steps he could be removed to Iran, but he gave reasons why he refused to co-operate relating to his fear of harm if he were to be so removed. Applying the *NZYQ* limitation, the primary judge concluded that, in determining whether there is a real prospect of a detainee’s removal from Australia becoming practicable in the reasonably foreseeable future, “*there is to be regard to all voluntary actions that may be undertaken by the detained person to assist in their removal irrespective of whether the detainee is refusing to undertake those actions in respect of removal to a particular place because of a genuine subjective fear of harm if removed to that place*”. The primary judge found that the constitutional limit had not been reached.

The appellant appealed to the Full Court. Following an application for removal by the Attorney-General of the Commonwealth, on 16 February 2024, Gageler CJ ordered that, pursuant to section 40 of the *Judiciary Act 1903* (Cth), the cause, namely the pending appeal, be removed into this Court.

The appellant contends that there should be no general rule that non-cooperation by a detainee such as the appellant will result in the constitutional limit not being reached. The Commonwealth submits that the primary judge was correct to find that the constitutional limit identified by *NZYQ* was not engaged in this case. The Commonwealth’s position is that the appellant is lawfully detained for the purpose of removal to Iran. He has not been removed to Iran because he has refused to meet with Iranian authorities for the purpose of procuring travel documents to facilitate his removal. There is no dispute that, if the appellant took the step of procuring such travel documents (which it is, and has at all times been, within his power to do), he could be removed to Iran.

The appellant has filed a notice of a constitutional matter. There have been no notices of intervention filed.

There has been an application made by a person known as AZC20 for leave to intervene or to appear as *amicus curiae*. AZC20's application to this Court is on the basis that he has an indirect but substantial legal interest in the outcome of the proceeding namely, his ongoing liberty.

The grounds of appeal in the cause removed are:

- The learned primary judge erred in finding that the detention of an unlawful non-citizen under ss 189 and 196 of the *Migration Act 1958* (Cth) ("Act") remains constitutionally permissible where the unlawful non-citizen person:
 - (a) has contributed to the frustration of, or has deliberately frustrated, their removal from Australia; and/or
 - (b) is not cooperating in their removal from Australia.
- Further or alternatively to ground 1, the learned primary judge erred in finding that the constitutional limitation was not reached as the Appellant's reason for not cooperating in being removed to Iran was not attributable to medical reasons or lack of knowledge.
- Further or alternatively to grounds 1 and 2, the learned primary judge erred in failing to find that:
 - (a) the Appellant's reason for refusing to cooperate in being removed to Iran (which would have involved cooperating with the Iranian authorities) was due to his genuine subjective fear of harm; and/or
 - (b) the constitutional limitation had been reached as a result of the Appellant's genuine subjective fear of harm.
- Further or alternatively to grounds 1, 2 and 3 above, the learned primary judge erred in:
 - (a) failing to draw the compelling inference of truthfulness of the Appellant's account as to the reason(s) for his non-cooperation in effecting his removal to Iran; and/or
 - (b) drawing an inference concerning the truthfulness of that same matter which was glaringly improbable.

DIRECTOR OF PUBLIC PROSECUTIONS v SMITH (M16/2024)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2023] VSCA 293

Date of judgment: 30 November 2023

Special leave granted: 8 February 2024

The respondent has been committed to stand trial in the County Court of Victoria on sexual offence charges where the complainant is a child. The *Criminal Procedure Act 2009* (Vic) (“the CPA”) provides for child complainants and complainants with a cognitive impairment to give evidence in a criminal proceeding for a sexual offence at a “special hearing” (sections 369 and 370), for a “ground rules hearing” (s 389E(1)) to take place before the special hearing at which the court can make or vary any direction for the efficient conduct of the proceeding, and for the appointment of an intermediary. Accordingly, Part 8.2 and 8.2A of the CPA apply to the trial of the respondent. This appeal arises from a judgment of the Court of Appeal of the Supreme Court of Victoria upon a case stated on questions of law relating to certain criminal trial procedures. The appeal raises for consideration the interaction between the scheme established by Parts 8.2 and 8.2A of the CPA with the principle of open justice and principles concerning the presence of the accused throughout a criminal proceeding.

In August 2022, the County Court directed that a “special hearing” be held before the trial. An intermediary assessment report stated that the complainant had anxiety and it would assist if she could meet with counsel and the judge prior to giving evidence at the special hearing. Subsequently and significantly, the judge, prosecutor, respondent’s counsel and the complainant met at the offices of the Child Witness Service in March 2023. The day after, a special hearing was conducted at which the complainant recorded evidence which was to be played at trial. Before the respondent’s trial commenced, the Court of Appeal handed down judgment in *Alec (a pseudonym) v The King* [2023] VSCA 208 (“*Alec*”), in which the Court of Appeal determined that a private “out of court” meeting between a judge and the principal prosecution witness (where no counsel were present in a remote witness facility) before a special hearing was a “fundamental irregularity” and “incompatible with the fundamental tenets of the system of criminal justice in this State”. The delivery of the judgment in *Alec* gives rise to the question of whether it was a fundamental irregularity for the judge in this matter to have met with the complainant in the circumstances that took place.

Four questions of law were reserved for determination by the Court of Appeal:

1. Did the meeting infringe the principles of open justice as identified in *Alec*?
2. Did the meeting bring the impartiality of the presiding judge into question?
3. Did the occurrence of the meeting represent a fundamental irregularity in the trial process, such as to constitute a serious departure from accepted trial processes?
4. If the answer to questions 1, 2 and/or 3 is in the affirmative, is the only remedy for the evidence of the complainant to be taken at a further special hearing conducted before a different judge?

The Court of Appeal unanimously answered yes to questions 1, 3 and 4, and did not consider it necessary to answer question 2.

The appellant submits that the CPA draws a distinction between a proceeding, hearings within the proceeding, and the trial. At the ground rules hearing, the judge, prosecutor and respondent's counsel agreed to meet with the complainant to "say hello". While this "introductory meeting" took place without the respondent's presence and was not recorded, the appellant submits that it is not considered a hearing in a criminal proceeding and therefore the respondent was not required to attend, or in any event waived his right to attend by not raising any objection. Even if the introductory meeting could give rise to a procedural irregularity, the remedy applied by the Court of Appeal could not cure such an irregularity and was instead directed towards an evidentiary irregularity by way of wrongful admission of evidence, which did not arise. The appellant submits that the meeting was consistent with the special hearing process outlined in the CPA, and there is no suggestion that anything transpired during the introductory meeting that has affected the respondent's ability to receive a fair trial.

The respondent submits that there is no provision in the CPA (nor in any other legislation) which authorises the holding of the introductory meeting. On the contrary, all legislation gives statutory expression to the principle of open justice and to the principle that an accused be present at trial. The respondent contends that there are very specific and limited powers for the public and/or an accused to be excluded from the hearing of a proceeding and there were no suppression, closed court or other orders made in relation to the introductory meeting. The respondent submits that the introductory meeting had the hallmarks of a hearing in that it was part of the proceeding, involved a judge convening with legal practitioners and a witness and was held in circumstances where the judge was acting judicially, but lacked the features of a hearing as required under Victorian law. If the purpose of the introductory meeting was to alleviate the complainant's anxiety, the judge was undertaking a "therapeutic" role which is not permitted in the context of s 389E of the CPA. The respondent rejects any suggestion of a waiver of his right to be present and submits that the introductory meeting represents a failure to observe the requirements of the criminal trial process in a fundamental respect. The only remedy is for the complainant's evidence to be taken at a further special hearing before a different judge.

The grounds of appeal are:

- (a) The Court of Appeal erred in finding that the introductory meeting between the child complainant, the presiding judge, the prosecutor and defence counsel prior to the special hearing at which the complainant gave evidence, was not authorised by s 389E of the *Criminal Procedure Act 2009* (Vic).
- (b) The Court of Appeal erred in finding that the introductory meeting was inconsistent with the principle of open justice.
- (c) The Court of Appeal erred in finding that the introductory meeting was a fundamental irregularity in the respondent's trial that could not be waived.

DAYNEY v THE KING (B69/2023)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2023] QCA 62

Date of judgment: 6 April 2023

Special leave granted: 21 November 2023

The appellant was charged with murder after becoming involved in a violent altercation with Mr Mark Spencer, resulting in Mr Spencer's death. The Crown alleged that the appellant killed Mr Spencer in a planned burglary after Mr Spencer contacted the appellant's girlfriend for escort services. The plan was for the appellant's girlfriend to distract Mr Spencer while the appellant stole drugs and money from Mr Spencer's house. However, the plan went awry when the appellant and Mr Spencer interacted with each other in the lounge room. The Crown submitted that the appellant launched a savage, unprovoked attack on an unarmed Mr Spencer, and that the serious nature of Mr Spencer's injuries justified an inference that the appellant had planned to kill, or cause grievous bodily harm, to Mr Spencer. The appellant pleaded self-defence and testified that Mr Spencer pulled out a pistol upon the appellant's sudden appearance in the lounge room, causing the appellant to be in fear of his and his girlfriend's lives and act in a way to protect them from Mr Spencer.

The appellant first stood trial in May 2018 and a jury found him guilty of murder. The appellant's counsel submitted that the jury should be directed about the potential applicability of both section 271 (self-defence against unprovoked assault) and s 272 (self-defence against provoked assault) of the *Criminal Code (Qld)* ("the Code"). However, the trial judge, Douglas J, declined to put s 271 to the jury, and only gave directions regarding s 272. The appellant appealed on the grounds that Douglas J's directions to the jury were erroneous.

The appeal was heard in 2020 and the Court of Appeal unanimously agreed that self-defence under s 271 of the Code ought to have been left to the jury, necessitating a retrial. However, the Court of Appeal was divided over the interpretation of s 272, with the majority (Fraser and McMurdo JJA) favouring the Crown's interpretation, and President Sofronoff dissenting. The appellant did not appeal the 2020 Court of Appeal decision.

The issue to be resolved is the statutory interpretation of s 272(2) of the Code, of which there are competing constructions which has resulted in divergent interpretations as to its ambit with s 272(1):

Section 272(1):

When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

Section 272(2):

This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

Fraser and McMurdo JJA concluded that s 272(2) of the Code created three separate and independent restrictions as to the availability of s 272(1), being:

- i) where an accused begins an assault with intent to kill or cause grievous bodily harm;
- ii) where the accused develops an intent to kill or cause grievous bodily harm before the necessity for self-preservation arises; and
- iii) where the accused did not decline further conflict or retreat from it before the necessity to cause death or grievous bodily harm arose (“the retreat condition”).

President Sofronoff held that the retreat condition applies to i) and ii), rather than it operating as a third and separate restriction. On this interpretation, the appellant contends that the retreat condition has no relevance to his trial based on his account of what transpired as he neither began the altercation intending to kill or do grievous bodily harm, nor endeavoured to use such force before the need arose. Instead, the appellant only intended to use such force after the need arose, and therefore his altercation with Mr Spencer did not fit into “either case” as per the wording in s 272(2).

The appellant’s retrial commenced in November 2021 before Bowskill SJA, with the facts remaining materially the same as the 2018 trial. Bowskill SJA put both ss 271 and 272 to the jury, and in relation to the latter, further directed the jury in accordance with the 2020 Court of Appeal majority decision – that is, the jury were instructed that the appellant could not rely on the substantive defence created by s 272(1) of the Code unless he had “before such necessity arose... declined further conflict, quitted it, or retreated from it as far as was practicable”.

The appellant was convicted of murder by the jury for a second time and seeks to challenge the correctness of the jury direction of Bowskill SJA by advancing a preference for the interpretation of President Sofronoff’s interpretation of s 272(2), in that the retreat condition operated as a modification to the first two clauses on s 272(2), rather than as an independent proviso to s 272(1). The 2023 Court of Appeal (Mullins P, Dalton JA and Boddice J) unanimously agreed that the 2020 Court of Appeal majority decision is correct.

The sole ground of appeal is:

- The Court of Appeal erred in holding that the final clause of s 272(2) of the *Criminal Code* (Qld) constitutes a standalone exception to the protection afforded by s 272(2) (self-defence against provoked assault).