OVERSEAS DECISIONS BULLETIN

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Decisions from the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa and the Supreme Court of New Zealand.

Administrative Law

See also Industrial Law: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*

Kwalindile Community; Zimbane Community v King Sabata Dalindyebo Municipality and Others

Constitutional Court of South Africa: [2013] ZACC 6.

Judgment delivered: 28 March 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Cameron, Froneman, Jafta, Nkabinde, Skweyiya, Van der Westhuizen and Zondo JJ.

Catchwords:

> Administrative law – Judicial review – Restitution of Land Rights Act, s 34 – Appellant communities sought restitution of their rights in land – The Land Claims Court, and the Supreme Court of Appeal found for the Municipality, making a non-restoration order on the basis that restoration would not be in the public interest – Whether it is in the public interest that the land the communities claim not be restored to them, or whether the public will suffer substantial prejudice should a court refuse to make a non-restoration order ahead of the final determination of the claims.

Held: Appeal allowed (unanimous). A non-restoration order violates the constitutional right of a claimant to possible restoration. Therefore, any order must be made with enough particularity to ensure that a

successful claim is not unduly curtailed. Further nothing on the facts justifies the conclusion that it is in the public interest for rights on vacant and undeveloped land not to be restored, or that there is substantial public prejudice because vacant and undeveloped land maybe restored to the applicant communities when their claim is finally determined.

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Uprichard v Scottish Ministers and another (Scotland)

Supreme Court of the United Kingdom: [2013] UKSC 21.

Judgment delivered: 24 April 2013

Coram: Lord Hope DPSC, Lord Kerr, Lord Reed, Lord Carnwath and Lord Carloway JJSC.

Catchwords:

> Administrative law – Adequacy of reasons – Fife Council proposed development of St. Andrews – Plan subsequently modified but not materially with respect to St. Andrews – Appellant objected to absence of any modification with respect to St. Andrews – Ministers approved the plan and provided reasons for their decision – Whether short reasons provided under broad categories are adequate in circumstances.

Held: Appeal dismissed (unanimously). The reasons given must be proper, adequate and intelligible, and must deal with the substantive points raised by way of objection. If that test is met, short reasons may suffice, and if a point of objection is not substantive, little or no reasoning may be given. Further, the Ministers' duty to give reasons must be assessed with a sense of proportion, so that an unreasonable burden is not imposed on them. Where Ministers receive a plethora of objections, it is reasonable for the Ministers to group them into broad categories according to their general tenor and to respond to them on that basis.

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KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal and Others

Constitutional Court of South Africa: [2013] ZACC 10.

Judgment delivered: 25 April 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Cameron, Froneman, Jafta, Nkabinde, Khampepe, Skweyiya, Yacoob and Zondo JJ.

Catchwords:

> Administrative law – Legitimate expectation – In 2008 the Department of Education issued a notice setting out "approximate" funding levels for the 2009 financial year – In May 2009, after the first payment had already fallen due, the Department issued a circular to schools warning that the subsidies would be cut by 30% - Applicant argued that the 2008 notice had given rise to an enforceable undertaking to pay the entire year's subsidy without reduction – Whether parties acted with intention of bringing enforceable obligations into existence.

Held: Appeal allowed (Mogoeng CJ, Jafta, Nkabinde and Zondo JJ dissenting). Majority accepted that in general subsidies promised by government may be reduced. However, for reasons based on reliance, accountability and rationality, a public office who promises to pay specified amounts to named recipients cannot unilaterally reduce the amounts to be paid after the due date for their payment has passed.

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Seaton v Minister for Land Information

Supreme Court of New Zealand: [2013] NZSC 42.

Judgment delivered: 29 April 2013.

Coram: Elias CJ, McGrath, William Young, Chambers and Glazebrook JJ.

Catchwords:

> Administrative law – Judicial review of Ministerial decision – Public Works Act, s 23 – New Zealand Transport Agency (NZTA) resolved to widen road – Completion of road-widening project required three electricity towers to be removed and placed on land owned by appellant – After period of unsuccessful negotiation Minister issued notice under s 23 of the Act to compel the appellant to grant easements over her property – Appellant sought declarations that Minister's decision to take the easements and the related s 23 notice were invalid on the ground that NZTA did not need the easements for the road-widening project – Whether the Minister properly used the processes under the Act to compulsorily acquire the easements over the appellant's land.

Held: Appeal allowed (McGrath, William Young JJ dissenting). The Minister is empowered to acquire land that is indirectly required for a Government work under s 16(1) of the Public Works Act. However, the majority held that the easements were not reasonably required, directly or indirectly, for the Government work of road-widening. Rather the easements were required for works of the utilities. Thus the Minister

must follow the procedure under s 186(1) of the Resource Management Act 1991.

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McBurney v Young

Supreme Court of the United States: Docket No 12-17.

Judgment delivered: 29 April 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Administrative law – Freedom of information – Petitioner non-Virginia citizens' records requests denied – Petitioner sough declaratory and injunctive relief for violations of the Privileges and Immunities Clause – Whether refusal to furnish information abridged the PIC where information available by other means.
>
> Constitutional law – Congressional duties and powers – Commerce clause – Whether Virginia law burdens or regulates interstate commerce

Held (9-0): Appeal dismissed.

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Behn v Moulton Contracting Ltd

Supreme Court of Canada: [2013] SCC 26.

Judgment delivered: 9 May 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Administrative law – Standing – Aboriginal law – Treaty rights – Duty to consult – Individual members of Aboriginal community asserted in defence to tort action against them that issuance of logging licences breached duty to consult and treaty rights – Whether individual members have standing to assert collective rights in defence.
>
> Civil procedure – Abuse of process – Motion to strike pleadings – Members of Aboriginal community blocked access to logging site and subsequently asserted in defence to tort action against them

that issuance of logging licences breached duty to consult and treaty rights – Whether raising defences constituted abuse of process.

Held: Appeal dismissed. The duty to consult exists to protect the collective rights of Aboriginal peoples and is owed to the Aboriginal group that holds them. While an Aboriginal group can authorise an individual or an organisation to represent it for the purpose of asserting its Aboriginal or treaty rights, here, it does not appear from the pleadings that the First Nation authorised the community members to represent it for the purpose of contesting the legality of the licences. Given the absence of an allegation of authorisation, the members cannot assert a breach of the duty to consult on their own.

Raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process in the circumstances of this case. Neither the First Nation nor the community members had made any attempt to legally challenge the licences when the Crown granted them. Had they done so, the logging company would not have been led to believe that it was free to plan and start its operations.

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Arlington v FCC

Supreme Court of the United States: Docket No 11-1545.

Judgment delivered: 20 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Administrative law – Judicial review – Chevron doctrine – Petitioner cities filed actions against Federal Communications Commission ("FCC") seeking judicial review of a ruling the FCC issued which established time frames state and local governments were supposed to meet when they received applications to place, construct or modify personal wireless service facilities – Timeframe was a rebuttable presumption of 90 days for collocation applications and 150 days for all other application – Whether courts had to apply the Chevron framework to an agency's interpretation of a statute that concerned the scope of the agency's jurisdiction.

Held (6-3): Appeal dismissed, Chevron doctrine applied.

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Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others

Constitutional Court of South Africa: [2013] ZACC 13.

Judgment delivered: 23 May 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Froneman, Jafta, Khampepe, Mhlantla AJ, Nkabinde, Skweyiya, Van der Westhuizen and Zondo JJ.

Catchwords:

> Administrative law – Judicial Review – Promotion of Administrative Justice Act ("PAJA") – Review for irrational decision – The Independent Commission for the Remuneration of Public Office Holders recommended a 7% increase for all public office-bearers for 2010/2011 financial year – Subsequently the President reduced increase to 5% – Whether decision of the President was void for irrationality.
>
> Constitutional law – Justiciability – Whether decision of the President is reviewable.

Held: Appeal dismissed (unanimous). Decision was rational. In any case the President's decision was non-justiciable under PAJA as it was an executive decision

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Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others

Constitutional Court of South Africa: [2013] ZACC 19.

Judgment delivered: 13 June 2013.

Coram: Moseneke DCJ, Froneman, Khampepe, Jafta, Nkabinde, Skweyiya, Van der Westhuizen, Zondo JJ and Mhlantla AJ.

Catchwords:

> Administrative law – Standing – Belgian authorities sought evidence relating to a third party's business with the applicant as part of an ongoing criminal investigation – Minister for Justice and Constitutional Development approved request and a Magistrate issued a subpoena – Applicant challenged the lawfulness of respondent's decisions on basis that absent an opportunity to be heard its constitutional rights to just administrative action and privacy would be breached – Whether applicant met requirements to establish own-interest standing under s 38 of the Constitution –

Held: Appeal dismissed (Jafta, Nkabinde and Zondo JJ dissenting). Applicant had not laid a basis to show that any of its purported interests – privacy, confidentiality or proprietary rights – existed in the information sought by the Belgian authorities.

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Bank Mellat v HM Treasury (Liberty intervening) (Nos 1 and 2)

Supreme Court of the United Kingdom: [2013] UKSC 38; [2013] UKSC 39.

Judgment delivered: 19 June 2013

Coram: Lord Neuberger PSC, Lord Hope DPSC, Lady Hale, Lord Kerr, Lord Clarke, Lord Dyson, Lord Sumption, Lord Reed and Lord Carnwath JJSC.

Catchwords:

> Administrative law – Executive powers – Order in Council — Validity — Treasury made Order in Council containing direction prohibiting transactions or business relationships with Iranian bank in order to prevent facilitation of nuclear weapons production in Iran — Bank given no opportunity to make representations before Order made — Bank applied to set aside direction — Whether Order proportionate — Whether procedurally flawed — Whether lawful.
>
> Civil procedure – Supreme Court — Jurisdiction — Evidence — Closed material procedure ("CMP") — Order in Council contained direction prohibiting transactions or business relationships with Iranian bank in order to prevent facilitation of nuclear weapons production in Iran — Bank appealed from courts' refusal to set aside direction — Treasury proposed to rely on closed material in resisting appeal — Whether Supreme Court has jurisdiction to hear closed evidence — Whether appropriate to do so.

Held: (i) By a majority of six to three (Lord Hope, Lord Kerr and Lord Reed dissenting) it is possible for the Supreme Court to adopt a CMP on an appeal, (ii) by a majority of five to four (Lord Hope, Lord Kerr, Lord Dyson, and Lord Reed dissenting), it is appropriate to adopt a CMP in this appeal.

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Agraira v Canada (Public Safety and Emergency Preparedness)

Supreme Court of Canada: [2013] SCC 36.

Judgment delivered: 20 June 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ.

Catchwords:

Administrative law – Judicial review – Standard of review – Ministerial decisions – Immigration – Citizen of Libya found to be inadmissible based on membership in terrorist organization – Application for ministerial relief denied – Appropriate standard of review to apply to Minister's decision – Whether, in light of this standard, Minister's decision is valid.

Administrative law – Natural justice – Legitimate expectations – Citizen of Libya found to be inadmissible based on membership in terrorist organization – Application for ministerial relief denied – Whether there was failure to meet legitimate expectations – Whether there was failure to discharge duty of procedural fairness.

Citizenship and Migration – Inadmissibility and removal – Ministerial relief – Citizen of Libya found to be inadmissible based on membership in terrorist organization – Application for ministerial relief denied – Interpretation of term "national interest" – Immigration and Refugee Protection Act, s 34(2).

Held: Appeal dismissed and Minister's decision under s 34(2) of the IRPA allowed to stand.

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Citizenship and Migration Law

See also Administrative Law: *Agraira v Canada (Public Safety and Emergency Preparedness)*

Moncrieffe v Holder

Supreme Court of the United States: Docket No 11-702.

Judgment delivered: 23 April 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Citizenship and migration – Deportation and removal – Grounds – Criminal activity – Petitioner convicted of possession of marijuana with intent to distribute, an aggravated felony under the Controlled Substances Act – Sentence to deportation – Whether the possession of marijuana with intent to distribute amounts to illicit drug trafficking – Whether this is an aggravated felony or a misdemeanour.

Held (7-2): Appeal allowed, case remanded.

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Civil Procedure

See also Administrative Law: *Behn v Moulton Contracting Ltd*

See also Administrative Law: *Bank Mellat v HM Treasury (Liberty intervening) (Nos 1 and 2)*

Standard Fire Insurance Co. v Knowles

Supreme Court of the United States: Docket No 11-1450.

Judgment delivered: 19 March 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Civil procedure – Class actions – Respondent insured filed a proposed class action in state court against petitioner insurer, stipulating that the class would seek less than $5 million in damages – After removal a district court remanded, finding that the amount in controversy fell below the threshold of s 1332(d) of the Class Action Fairness Act – Whether class action should go ahead.

Held: Judgment remanding the case was vacated and case remanded for further proceedings (unanimous).

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Comcast Corp v Behrend

Supreme Court of the United States: Docket No 11-864.

Judgment delivered: 27 March 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Civil procedure – Class actions – Prerequisites – Respondent subscribers of cable-television services brought a putative class action against petitioner alleging that the providers violated antitrust laws by swapping services with competitors in order to serve certain areas – Whether attributable damages were common across the entire class.

Held (5-4): Judgment upholding certification of the subscriber's class reversed.

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Penner v. Niagara (Regional Police Services Board)

Supreme Court of Canada: [2013] SCC 19.

Judgment delivered: 5 April 2013.

Coram: McLachlin CJ LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

Catchwords:

> Civil procedure – Issue estoppel – Administrative law – Police disciplinary proceedings – Complaint alleging police misconduct brought under Police Services Act ("PSA") – Civil action for damages arising from same incident also commenced – PSA hearing officer found no misconduct and dismissed complaint – Motion judge and Court of Appeal exercised discretion to apply issue estoppel to bar civil claims on basis of hearing officer's decision – Whether public policy rule precluding applicability of issue estoppel to police disciplinary hearings should be created – Whether unfairness arises from application of issue estoppel in this case.

Held: Appeal allowed (LeBel, Abella and Rothstein JJ dissenting). It is neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met. There is no reason to depart from that approach. However, in the circumstances of this case, it was unfair to P to apply issue estoppel to bar his civil action on the basis of the hearing officer's

decision. The Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights.

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Oxford Health Plans LLC v Sutter

Supreme Court of the United States: Docket No 12-135.

Judgment delivered: 10 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Civil procedure – Alternative dispute resolutions – Judicial review – Federal Arbitration Act – Petitioner insurer moved to vacate an arbitrator's decision under s10(a)(4) of the Act – Whether s 10(a)(4) allows a court to vacate an arbitral award.

Held (9-0): Appeal dismissed, appellate court's judgment affirmed.

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AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC

Supreme Court of the United Kingdom: [2013] UKSC 35.

Judgment delivered: 12 June 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Sumption and Lord Toulson JJSC.

Catchwords:

> Civil procedure – Arbitration – Injunction – Jurisdiction to grant — Restraint of foreign proceedings — Court proceedings commenced in Kazakhstan in breach of agreement for arbitration in London — Whether English court having jurisdiction to grant anti-suit injunction restraining foreign proceedings when neither party commencing or contemplating arbitration in London.

Held: Appeal dismissed (unanimous). The English courts have a long-standing and well-recognised jurisdiction to restrain foreign proceedings brought in violation of an arbitration agreement, even where no arbitration is on foot or in contemplation. Nothing in the Arbitration Act 1996 ("the 1996 Act") has removed this power from the courts

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Apollo Engineering Limited v James Scott Limited (Scotland)

Supreme Court of the United Kingdom: [2013] UKSC 37.

Judgment delivered: 13 June 2013

Coram: Lord Hope DPSC, Lord Clarke and Lord Carnwath JJSC.

Catchwords:

> Civil procedure – Supreme Court jurisdiction – Jurisdiction to hear appeals in Scottish civil cases – Appellant wished to appeal against two orders of the Inner House of the Court of Session – Appellant company ran out of money – Leave to appeal to the Supreme Court denied because Scots law requires company to be represented – Whether appellant can appeal to the Supreme Court without leave of Inner House.

Held: Apollo can competently appeal to the Supreme Court without the leave of the Inner House against the part of the order of 27 November 2012 which dismissed the stated case, as long as the appeal raises a question which can be responsibly be certified by counsel as reasonable.

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Sable Offshore Energy Inc. v Ameron International Corp.

Supreme Court of Canada: [2013] SCC 37.

Judgment delivered: 20 June 2013.

Coram: McLachlin CJ, LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Civil Procedure – Access to justice – Disclosure – Privilege – Promoting Settlement – Settlement privilege – Scope of protection offered by settlement privilege – Appellants entered into Pierringer Agreements with some defendants to multi-party litigation – Non-settling defendants sought disclosure of amount of settlements prior to trial – Whether amounts of negotiated settlements protected by settlement privilege

Held: Appeal allowed. There is no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

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American Express Co. v Italian Colors Restaurant
Supreme Court of the United States: Docket No 12-133.

Judgment delivered: 20 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer and Kagan JJ.

Catchwords:

> Civil procedure – Class actions – Alternative dispute resolutions - Arbitrations – Respondent merchants filed a class action against petitioner claiming violation of § 1 of the Sherman Act – The merchants had entered into an agreement with petitioner which required them to resolve disputes they had with the company by arbitration, and provided that they did not have the right to arbitrate any claim "on a class action basis" – District court granted petitioners' motion to compel individual arbitration under the Federal Arbitration Act (FAA), 9 U.S.C.S. § 1 et seq – Whether class action allowed.
>
> Competition law – Respondents alleged that petitioner used its monopoly power to force merchants to accept credit cards at rates approximately 30 per cent higher than fees charged for competing cards – Whether breach of antitrust law.

Held (5-3): Appeal allowed. Class action not allowed under the agreement.

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Competition Law

See also Intellectual Property: *FTC v Actavis, Inc.*

See also Civil Procedure: *American Express Co. v Italian Colors Restaurant*

Constitutional Law

See also Administrative Law: *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others*

See also Administrative Law: *McBurney v Young*

Florida v Jardines

Supreme Court of the United States: Docket No 11-564.

Judgment delivered: 26 March 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Bill of Rights – Search and seizure – Police took a drug-sniffing dog to defendant's front porch resulting in a positive alert for narcotics – Officers obtained a search warrant, found marijuana plants and charged defendant with trafficking in cannabis – Whether officers had probable cause for initial search – Whether drug-sniffing dog can be introduced onto front porch absent search warrant – Whether evidence should be suppressed.
>
> Criminal law – Search and seizure – Warrantless searches – Expectation of privacy.

Held (6-3): Appeal dismissed.

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Genesis Health Care Corp v Symczyk

Supreme Court of the United States: Docket No 11-1059.

Judgment delivered: 1 April 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Justiciability – Case or controversy – Respondent employee's collective action under the Fair Labor Standards Act dismissed for lack of subject-matter jurisdiction – Whether correct approach where respondent ignored petitioner employers' offer of judgment on a finding that since no other employee had joined and the offer satisfied her claim, the suit was moot.

Held (5-4): Appeal allowed. Case moot.

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Missouri v McNeely

Supreme Court of the United States: Docket No 11-1425.

Judgment delivered: 17 April 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Bill of Rights – Search and seizure – Warrantless searches – Defendant charged with driving while intoxicated – Blood taken for chemical testing without first obtaining a search warrant – Motion to suppress results of blood test granted – Whether the natural metabolisation of alcohol in the bloodstream presented a per se exigency that justified an exception to the Fourth Amendment's warrant requirement for non-consensual blood testing in all drunk-driving cases.
>
> Criminal law – Search and seizure – Warrantless searches – Blood alcohol.

Held (5-4): Appeal dismissed,

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Agri South Africa v Minister for Minerals and Energy

Constitutional Court of South Africa: [2013] ZACC 9.

Judgment delivered: 18 April 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Cameron, Jafta, Nkabinde, Skweyiya, Yacoob and Zondo JJ.

Catchwords:

> Constitutional law – Mineral Petroleum Resources Development Act 2004 – The MPRD Act was introduced as part of transition from apartheid regime and had the effect of freezing the ability to sell, lease or cede unused old order rights until converted into prospecting or mining rights with the written consent of the Minister – Appellant claimed that the Act had the effect of expropriating mineral rights – Whether the Act is invalid by virtue of s 25(1) of the Constitution which prohibits deprivation of property.

Held: Appeal dismissed (Cameron, Froneman and Van der Westhuizen JJ agreeing on separate points). While the MPRD Act deprived the appellant of its coal rights, the deprivation did not rise to the level of expropriation: 1) because the Act made transitional arrangements which protected pre-existing mineral rights and improved security of tenure, and 2) because the object of the Act was, *inter alia*, to facilitate equitable access to the mining industry and advance the eradication of all forms of discriminatory practices in the mining sector.

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Salvesen v Riddell and another (Lord Advocate intervening) (Scotland)

Supreme Court of the United Kingdom: [2013] UKSC 22.

Judgment delivered: 24 April 2013

Coram: Lord Hope DPSC, Lord Kerr, Lord Wilson, Lord Reed and Lord Toulson JJSC.

Catchwords:

> Constitutional law – Scotland Act 1998 – Agricultural Holdings (Scotland) Act 2003 – s 72 of the 2003 Act provided a mechanism to prevent landlords from terminating tenancies on their agricultural holdings – Appellant was landlord seeking to terminate tenancy – Whether s 72(6) applied to the appellant.
>
> Human rights law – European Convention on Human Rights – First Protocol – Whether s 72 of the 2003 Act violates A1P1 of the European Convention on Human Rights.

Held: Appeal allowed (unanimous). Mr Salvesen's A1P1 rights were violated by section 72(10) of the 2003 Act and that this provision is outside the legislative competence of the Scottish Parliament.

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Rademan v Moqhaka Local Municipality and Others

Constitutional Court of South Africa: [2013] ZACC 11.

Judgment delivered: 26 April 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Froneman, Jafta, Mhlantla AJ, Nkabinde, Skweyiya, Van der Westhuizen and Zondo JJ.

Catchwords:

Constitutional law – Inconsistency between legislative Acts – In furtherance of a dispute with the Municipality, the Appellant withheld payment of property rates and taxes but paid electricity and other services accounts in full – In response the Municipality disconnected the appellant's electricity supply – Appellant claimed the municipality was precluded from disconnecting her electricity supply under the Electricity Regulation Act – Whether municipality had any grounds under the ERA – Whether Local Government Acts were inconsistent with the ERA.

Held: Appeal dismissed (unanimous, Froneman J with different reasons). Majority held that the municipality had grounds under the ERA to terminate the appellant's electricity supply. Further, no inconsistency existed between the ERA and the relevant Local Government Acts.

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Levkovic v The Queen

Supreme Court of Canada: [2013] SCC 25.

Judgment delivered: 3 May 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ.

Catchwords:

Constitutional law – Charter of Rights – Right to liberty – Right to security of person – Fundamental justice – Vagueness – Criminal Code, s 243 prohibits the disposal of the dead body of a child with intent to conceal its delivery whether the child died before, during or after birth – Whether provision is impermissibly vague in its application to child that died before birth – Whether provision infringes rights to liberty and security of person.

Criminal Law – Offences – Concealing body of child – Whether phrase "child [that] died…before birth" satisfies requirement of certainty.

Held: Appeal dismissed. Section 243 meets the minimum standard of precision required by the *Charter*. In its application to a child that died before birth, it only captures the disposal of the remains of children that were likely to be born alive. A conviction will only lie where the Crown proves that the child, to the knowledge of the accused, was likely to have been born alive

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Maryland v King

Supreme Court of the United States: Docket No 12-207.

Judgment delivered: 3 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Bill of Rights – Search and seizure – Defendant arrested – As part of routine booking procedure defendant's DNA sample was taken by applying a cotton swab to the inside of his cheeks – DNA found to match DNA taken from a rape victim – Defendant indicted for rape – Motion to suppress DNA evidence under the Fourth Amendment denied – Court of Appeals of Maryland struck down portions of Maryland DNA Collection Act as unconstitutional and set aside defendant's rape conviction – Whether taking and analysing a cheek swab of defendant's DNA evidence is valid under the Fourth Amendment.
>
> Criminal law – Search and seizure – Motion to suppress evidence.

Held (5-4): Appeal allowed, judgment below reversed.

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Horne v Department of Agriculture

Supreme Court of the United States: Docket No 12-123.

Judgment delivered: 10 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Jurisdiction – Petitioner growers brought proceedings under the Agricultural Marketing Agreement Act ("AMAA") on basis that they were "producers" and therefore exempt from a Raisin Marketing Order – Court of Appeals for the Ninth Circuit upheld rulings that the growers were handlers and held that it lacked jurisdiction over their takings claim – Whether the Ninth Circuit had jurisdiction over the takings claim.
>
> Statutory interpretation – AMAA – Whether petitioner growers were "producers" under the AAMA Act and thus exempt from penalties.

Held (9-0): Appeal allowed, Ninth Circuits decision reversed and case remanded.

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Frank Nabolisa v The State

Constitutional Court of South Africa: [2013] ZACC 17.

Judgment delivered: 12 June 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Froneman, Khampepe, Jafta, Nkabinde, Skweyiya, Van der Westhuizen, Zondo JJ and Mhlantla AJ.

Catchwords:

> Constitutional law – Applicant convicted of dealing in a dependence-inducing drug and sentenced to 12 years imprisonment – Applicant appealed conviction and sentence – State did not seek leave to cross-appeal against the sentence but in supplementary written submissions stated that it would argue for the sentence imposed to be increased to 20 years – Supreme Court of Appeal found in State's favour and increased sentence to 20 years – Applicant argued that by failing to seek leave to cross-appeal the State breached s 316 of the Criminal Procedure Act and violated his constitutional right to a fair hearing
>
> Statutory interpretation – Criminal Procedure Act, s 316.

Held: Appeal upheld (Moseneke DCJ, Skweyiya and Van der Westhuizen JJ dissenting). The State must satisfy s 316 of the Act and seek leave to cross-appeal to increase a sentence. Failure to do so means that the State loses its right to appeal.

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Arizona v Inter Tribal Council of Arizona, Inc.

Supreme Court of the United States: Docket No 12-71.

Judgment delivered: 17 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Inconsistency – Pre-emption – Respondents filed an action against State of Arizona seeking an order enjoining Arizona from enforcing Ariz. Rev. Stat. Ann. § 16-166(F) – Provision required county recorders to reject any application for registration to vote that was not accompanied by satisfactory

evidence of United States citizenship – Whether § 16-166(F) was pre-empted by the National Voter Registration Act of 1993.

Held (7-2): Appeal dismissed. Arizona provision inconsistent with Federal law.

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Salinas v Texas

Supreme Court of the United States: Docket No 12-246.

Judgment delivered: 17 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan JJ.

Catchwords:

Constitutional law – Bill of Rights – Fifth Amendment – Self-incrimination privilege – Petitioner voluntarily answered some of a police officer's questions about a murder but fell silent when asked whether ballistics testing would have matched his shotgun to shell casings found at the scene of the crime – Petitioner had not been placed in custody or received a Miranda warning – Petitioner did not testify at his murder trial – Over his objection, prosecutors used his reaction to a police officer's question during an interview as evidence of his guilt – Jury found petitioner guilty and he received a 20 year sentence – Whether use of silence violated the Fifth Amendment.

Evidence – Privileges – Self-incrimination – Whether a person must assert the privilege against self-incrimination to subsequently benefit from it – Whether a person can invoke the privilege by remaining silent.

Held (5-4): Appeal dismissed. Petitioner's situation was outside the scope of Miranda because he agreed to accompany the officers to the station and was free to leave at any time during the interview.

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Agency for International Development v Alliance for Open Society International, Inc.

Supreme Court of the United States: Docket No 12-10.

Judgment delivered: 20 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Bill of Rights – Freedom of speech – Scope of freedom – Respondent organisations sued petitioned federal agencies seeking a declaration that a requirement to expressly oppose prostitution in order to receive federal funds to fight the spread of HIV/AIDS violated the organisations' freedom of speech – Whether requirement was a breach of freedom of speech.

Held (6-2): The judgment upholding a preliminary injunction against enforcement of the policy requirement was affirmed.

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Fisher v University of Texas at Austin

Supreme Court of the United States: Docket No 11-345.

Judgment delivered: 24 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito and Sotomayor JJ.

Catchwords:

> Constitutional law – Equal protection – Racial discrimination – Petitioner applicant sued respondents, a state university and school officials alleging that the university's consideration of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment – Whether standard of review of racial classifications imposed by government is good faith or strict scrutiny.

Held (7-1): The judgment was vacated. The case was remanded so that the admissions process could be considered and judged under a correct analysis (strict scrutiny).

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Mutual Pharmaceutical Co. v Bartlett

Supreme Court of the United States: Docket No 12-142.

Judgment delivered: 24 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Constitutional law – Respondent prescribed Clinoril, the brand-name version of the nonsteroidal anti-inflammatory drug (NSAID) sulindac, for shoulder pain – Pharmacist dispensed a generic form of sulindac manufactured by petitioner Mutual Pharmaceutical – Respondent suffered an acute case of toxic epidermal necrolysis and is now severely disfigured – Respondent sued under state law and was awarded $21 million – Federal Food, Drug, and Cosmetic Act (FDCA) requires manufacturers to gain Food and Drug Administration (FDA) approval before marketing any brand-name or generic drug in interstate commerce – Respondent argued impossible to follow state and federal law simultaneously – Whether Federal law pre-empts State law.

Held (5-4): Appeal allowed. State-law design-defect claims that turn on the adequacy of a drug's warnings are pre-empted by federal law

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United States v Kebodeaux

Supreme Court of the United States: Docket No 12-418.

Judgment delivered: 24 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Constitutional law – Inconsistency of state and Federal regulations – Sex Offender Registration and Notification Act (SORNA) – Respondent as member of the Air Force was convicted of statutory rape – Several years after completing sentence Congress enacted SORNA – SORNA requires Federal sex offenders to register in States in which they live – Respondent registered but failed to re-register after moving interstate – Whether Congress has power to enact SORNA's registration requirements and apply them to an offender who had already completed his sentence.

Held (7-2): Appeal allowed. Congress has the power under Article I, Section 8, Clause 14 (the "Military Regulation" Clause) to "make Rules for the…Regulation of the land and naval Forces". Applying the Necessary and Proper Clause to the Military Regulation Clause, the Court held that SORNA made reasonable changes to the existing statutory regime governing sex offender registration.

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Shelby County v Holder

Supreme Court of the United States: Docket No 12-96.

Judgment delivered: 25 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Voting Rights Act – Discrimination – Preclearance requirement – s 5 of the Act required all state and local governments with a history of voting discrimination to obtain approval from the federal government before making any amendments to their voting laws or procedures – s 4 sets out the formula for determining which jurisdictions will be subject to the preclearance requirements – Whether ss 4 and 5 are valid.

Held (5-4): The Court held that the preclearance requirement under s 5 is constitutional, but the formula under s 4 is not. Thus s 5 has no effect unless and until Congress passes legislation determining which jurisdictions are covered by the preclearance requirement.

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Contract Law

Vestergaard Frandsen A/S and others v Bestnet Europe Ltd and others

Supreme Court of the United Kingdom: [2013] UKSC 31.

Judgment delivered: 22 May 2013

Coram: Lord Neuberger PSC, Lord Clarke, Lord Sumption, Lord Reed and Lord Carnwath JJSC.

Catchwords:

> Contract law – Confidential information - Breach of confidence - Trade secrets - Former employee of claimants starting new business which developed product using claimants' trade secrets - Former employee not knowing trade secrets and unaware that they were being misused - Whether in breach of express or implied terms of employment contract with claimants - Whether party to common design involving misuse of trade secrets - Whether liable to claimants for misuse of their confidential information.
>
> Equity – confidential information – breach of confidence - Whether party to common design involving misuse of trade secrets -

Whether liable to claimants for misuse of their confidential information.

Held: Appeal dismissed (unanimous).

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Corporations Law

See also Equity: *Prest v Petrodel Resources Limited & Others*

BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc and others

Supreme Court of the United Kingdom: [2013] UKSC 28.

Judgment delivered: 9 May 2013

Coram: Lord Hope DPSC, Lord Walker, Lord Mance, Lord Sumption and Lord Carnwath JJSC.

Catchwords:

Corporations law – Insolvency - Winding up - Company's debts - Company deemed "unable to pay its debts" where its assets exceeded by liabilities "taking into account its contingent and prospective liabilities" - Whether prospective liabilities to be taken into account at face value irrespective of maturity date or rate of interest payable in meantime - Whether company unable to pay debts.

Held: Appeal and cross-appeal dismissed (unanimous).

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Marks & Spencer plc v Revenue and Customs Commissioners

Supreme Court of the United Kingdom: [2013] UKSC 30.

Judgment delivered: 22 May 2013

Coram: Lord Neuberger PSC, Lord Hope DPSC, Lord Mance, Lord Reed and Lord Carnwath JJSC.

Catchwords:

Corporations law – Corporation tax - Group relief - Parent company established in United Kingdom with subsidiaries

established in different member states ceased to trade and dissolved following liquidation - Parent company wished to set off subsidiaries' losses against profits for purposes of liability to corporation tax - European Court of Justice ruled that domestic measure restricting cross-border group relief in respect of subsidiaries' losses justified save where subsidiaries' losses unavailable for utilisation in own member states - Whether circumstances to be examined at date of parent company's claim or at end of accounting period in which losses crystallised.

Held: Revenue and Customs Commissioners appeal dismissed (unanimous).

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Criminal Law

See also Constitutional Law: *Florida v Jardines*

See also Constitutional Law: *Missouri v McNeely*

See also Constitutional Law: *Levkovic v The Queen*

See also Constitutional Law: *Maryland v King*

See also Human Rights Law: *O'Neill; Lauchlan v HM Advocate (No 2) (Scotland)*

R v TELUS Communications Co

Supreme Court of Canada: [2013] SCC 16.

Judgment delivered: 27 March 2013

Coram: McLachlin CJ, LeBel, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ.

Catchwords:

Criminal law – Interception of communications – General warrant – Telecommunications company employed unique process for transmitting text messages resulting in messages stored on their computer database for brief period of time – General warrant required telecommunications company to produce all text messages sent and received by two subscribers on prospective, daily basis – Whether general warrant power in s. 487.01 of Criminal Code can authorise prospective production of future text messages from service provider's computer – Whether

investigative technique authorized by general warrant in this case is an interception requiring authorization under Part VI of Criminal Code – Whether general warrant may properly issue where substance of investigative technique, if not its precise form, is addressed by existing legislative provision.

Held: Appeal allowed (McLachlin CJ and Cromwell dissenting). The general warrant and related assistance order should be quashed.

Per LeBel, Fish and Abella JJ: The general warrant in this case was invalid because the police had failed to satisfy the requirement under s. 487.01(1)(*c*) of the *Code* that a general warrant could not be issued if another provision in the *Code* is available to authorise the technique used by police.

Per Moldaver and Karakatsanis JJ: The general warrant is invalid because the investigative technique it authorised was substantively equivalent to an intercept. The police could and should have sought a Part VI authorisation.

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Marshall v Rodgers

Supreme Court of the United States: Docket No 12-382.

Judgment delivered: 1 April 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Criminal law – Right to legal representation – Respondent inmate filed a habeas corpus petition arguing that the state courts violated his Sixth Amendment right to effective assistance of counsel by declining to appoint an attorney to assist in filing a motion for a new trial – Respondent had waived right to counsel on three previous occasions – Whether after a defendant's valid waiver of counsel, a trial judge had discretion to deny the defendant's later request for reappointment of counsel.

Held (9-0): Appeal allowed. Case remanded for further proceedings. Trial judge does have discretion to deny defendant's request for appointment of counsel in circumstances where defendant has waived right previously.

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Regina (Jones) v First-tier Tribunal (Social Entitlement Chamber)

Supreme Court of the United Kingdom: [2013] UKSC 19.

Judgment delivered: 17 April 2013

Coram: Lord Neuberger PSC, Lord Kerr, Lord Clarke, Lord Sumption and Lord Carnwath JJSC.

Catchwords:

> Criminal law – Criminal Injuries Compensation Authority – Compensation, whether payable – Man ran onto road and stood in front of oncoming lorry – Lorry driver swerved in unsuccessful attempt to avoid him and collided with claimant's vehicle – Man killed and claimant seriously injured – Claimant sought compensation as victim of "crime of violence" – Claimant alleged deceased's actions amounted to offence of inflicting grievous bodily harm – Whether offence "crime of violence" for purposes of compensation scheme – Whether deceased had necessary mens rea.

Held: Appeal allowed (unanimous). The terms of the Scheme do not permit an award of compensation to be made in this case.

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R v W.H.
Supreme Court of Canada: [2013] SCC 22.

Judgment delivered: 19 April 2013.

Coram: McLachlin CJ, LeBel, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Catchwords:

> Criminal law – Appeals – Unreasonable verdict – Role of appellate court when assessing reasonableness of verdict based on jury's assessment of witness credibility – Jury found accused guilty of sexual assault – Court of Appeal concluded that verdict was unreasonable and entered an acquittal – Whether Court of Appeal applied proper legal test – Whether the verdict was unreasonable.

Held: Appeal allowed and conviction restored. The Court of Appeal in applied the wrong legal test and, in carrying out its review of the jury's verdict, failed to give sufficient deference to the jury's assessment of witness credibility. The test to be applied by courts of appeal in reviewing guilty verdicts for unreasonableness does not involve the reviewing court attempting to put itself in the place of an imaginary trial judge and on a review of the written record asking whether that imaginary judge could have articulated legally adequate reasons for

conviction. The Court of Appeal's adoption of this new test resulted in its failure to take a sufficiently deferential approach to the findings of the jury viewed, as they must be, in the context of the whole of the evidence

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Buzizi v R

Supreme Court of Canada: [2013] SCC 27.

Judgment delivered: 10 May 2013.

Coram: LeBel, Fish, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Criminal law – Defences – Provocation – Accused convicted of second degree murder – Whether defence of provocation should have been put to jury – Whether objective and subjective elements of defence of provocation were established, thereby lending air of reality to this defence.

Held: Appeal allowed (LeBel and Wagner JJ dissenting). Verdict of guilty set aside and a new trial ordered. To the extent that the evidence adduced before him was reasonably capable of supporting the inferences necessary to make out the defence, the trial judge was bound to put the defence of provocation to the jury. The air of reality test is not intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The relevant question is whether the record contains a sufficient factual foundation for a properly instructed jury to give effect to the defence.

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R v A.D.H.

Supreme Court of Canada: [2013] SCC 28.

Judgment delivered: 17 May 2013.

Coram: McLachlin CJ, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Catchwords:

> Criminal law – Child abandonment – Mens rea – Accused gave birth in washroom at retail store and left newborn in toilet – Accused testified that she had not realised she was pregnant and that she believed child was born dead – Acquittal entered – Whether fault element is subjective or objective.

Held: Appeal dismissed.

> Per McLachlin CJ, Fish, Abella, Cromwell and Karakatsanis JJ: The text, context and purpose of s. 218 of the *Code* show that subjective fault is required. It follows that the trial judge did not err in acquitting the respondent on the basis that this subjective fault requirement had not been proved. The Court of Appeal was correct to uphold the acquittal.
>
> Per Rothstein and Moldaver JJ: Under a penal negligence standard, a mistake of fact that is both honest and reasonable affords a complete defence. Thus, an objective *mens rea* standard does not punish the morally blameless. In the present circumstances, the trial judge found that the respondent honestly believed that her child was dead at birth and that this belief was objectively reasonable. As such, she was entitled to be acquitted based on the defence of honest and reasonable mistake of fact.

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Metrish v Lancaster

Supreme Court of the United States: Docket No 12-547.

Judgment delivered: 20 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Criminal law – Trials – Defendant's rights – Right to due process – In 1994 respondent inmate convicted of first-degree murder – Inmate subsequently obtained federal habeas relief due to a prosecutor exercising a race-based peremptory challenge to a potential juror – At 2001 retrial inmate not allowed to present a diminished-capacity defence because Michigan law had changed to preclude such a defence – Whether defendant has right to present defence based on 1994 law.

Held (9-0): Appeal allowed. Defendant not entitled to rely on defence of diminished capacity.

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McQuiggin v Perkins

Supreme Court of the United States: Docket No 12-126.

Judgment delivered: 28 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Criminal law – Habeas corpus – Procedural default – In 2008 respondent state inmate filed a petition for a writ of habeas corpus seeking federal district court review of his conviction for first-degree murder claiming actual innocence and ineffective assistance of counsel – Petition was more than 11 years after conviction – District court dismissed petition but Court of Appeals for the Sixth Circuit reversed and remanded – Whether timing requirements could be overcome by a showing of actual innocence.

Held (5-4): Appeal allowed, judgment below vacated and case remanded.

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Trevino v Thaler

Supreme Court of the United States: Docket No 11-10189.

Judgment delivered: 28 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Criminal law – Habeas corpus – Procedural default – Ineffective assistance of counsel ("IATC") – Texas court found petitioner death row inmate's ineffective assistance of trial counsel claim was procedurally defaulted for failure to raise it in initial state post-conviction proceedings – US Court of Appeal for the Fifth Circuit affirmed – Whether IATC claims must be raised on initial collateral review.

Held (5-4): Appeal allowed, judgment below vacated and case remanded.

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R. v Gauthier

Supreme Court of Canada: [2013] SCC 32.

Judgment delivered: 7 June 2013.

Coram: LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Criminal law – Defences – Charge to jury – Defences that are incompatible in theory – Accused charged with being party, together with her spouse, to murder of their three children – Alternative defence that accused had abandoned common intention to kill children – Whether it was appropriate to exclude defence of abandonment from defences put to jury on basis that it was incompatible with defence's principal theory, absence of mens rea.
>
> Criminal law – Defences – Abandonment – Participation in crime – Accused charged with being party, together with her spouse, to murder of their three children – Alternative defence that accused had abandoned common intention to kill children – Essential elements of defence of abandonment in context of forms of participation in crime provided for in s 21(1) and s 21(2) of Criminal Code – Whether defence of abandonment raised by accused met air of reality test

Held: Appeal dismissed (Fish J dissenting). There is no cardinal rule against putting to a jury an alternative defence that is at first glance incompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true. …The defence of abandonment…did not meet the air of reality test, and the trial judge was not required to put the defence to the jury.

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Peugh v United States

Supreme Court of the United States: Docket No 12-62.

Judgment delivered: 10 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Criminal law – Sentencing – Found guilty of bank fraud, defendant argued on appeal that the Ex Post Facto Clause required that he be sentenced under the 1998 version of the US Sentencing Guidelines Manual in effect at the time of his offenses, rather than

under the 2009 version in effect at the time of sentencing – Whether the Ex Post Facto Clause was violated because the 2009 Guidelines called for a greater punishment than the 2000 Guidelines.

Held (5-4): The judgment affirming the sentence was reversed, and the case was remanded.

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United States v Davila

Supreme Court of the United States: Docket No 12-167.

Judgment delivered: 13 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Criminal law – Appeals – Standard of review – Defendant entered a guilty plea to conspiracy to defraud the U.S. by filing false income tax returns – District court denied defendant's motion to vacate plea – On appeal, defendant argued that a magistrate judge had improperly participated in the plea negotiations in violation of Fed. R. Crim. P. 11(c)(1) – Magistrate judge had told defendant that his best course, given the strength of the government's case, was to plead guilty – Whether magistrate judge's violation of Rule 11(c)(1) required automatic vacatur of the guilty plea, obviating any need to inquire whether the error was prejudicial.

Held (9-0): The Court vacated the circuit court's judgment and remanded the case for further proceedings. Under Rule 11(h), vacatur was not required if the record showed no prejudice to the defendant's decision to plead guilty. The Court further held that violation of Rule 11(c)(1) was not a structural error and that in assessing Rule 11 errors, a reviewing court had to take account of all that transpired. The circuit court should not have assessed the magistrate's comment in isolation but in light of the full record to determine if it was reasonably probable that, but for the magistrate's comments, defendant would have exercised his right to go to trial.

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Alleyne v United States

Supreme Court of the United States: Docket No 11-9335.

Judgment delivered: 17 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Criminal law – Sentencing – Defendant convicted of using or carrying a firearm in relation to a crime of violence – However sentence based on a finding that defendant brandished the firearm even though jury did not find brandishing beyond a reasonable doubt – Had the effect of increasing sentence from 5 years to 7 years – Whether brandishing was an element of the offence which must be found by the jury beyond reasonable doubt.

Held (5-4): The court vacated the circuit court's judgment with respect to defendant's sentence on conviction and remanded the case for resentencing consistent with the jury's verdict

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R v Baldree

Supreme Court of Canada: [2013] SCC 35.

Judgment delivered: 19 June 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Evidence – Admissibility – Hearsay – Drug purchase call – Implied Assertions – Implied assertion tendered for the truth of its contents – Applicability of hearsay rule – Purposive approach – Principled analysis of its necessity and reliability – After B was arrested a caller rang B's mobile phone to arrange for a drug delivery – Police officer answered and agreed to deliver the drugs at the price that B usually charged – Caller gave his address though no effort was made to find and interview him and he was not called as a witness – Whether police officer's testimony was hearsay.

Held: Appeal dismissed.

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Descamps v United States

Supreme Court of the United States: Docket No 11-9540.

Judgment delivered: 20 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer and Kagan JJ.

Catchwords:

> Criminal law – Sentencing – Guidelines – Petitioner defendant convicted of being a felon in possession of a firearm – District court subsequently found he had three prior convictions, including one for burglary – District court enhanced petitioner's sentence under the Armed Career Criminal Act ("ACCA") – Whether courts can use a modified categorical approach to look behind defendant's conviction in search of record evidence that he actually committed the generic offense of burglary.

Held (8-1): Appeal allowed.

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Environmental Law

Decker v Northwest Environmental Defense Center

Supreme Court of the United States: Docket No 11-338.

Judgment delivered: 20 March 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Environmental law – Clean Water Act ("CWA") – Respondent organisation sued petitioners under the CWA's citizen-suit provision alleging failure to obtain permits – Whether permit required – Whether case was mooted by the Environmental Protection Agency's 2012 amendment to the Industrial Stormwater Rule.

Held (8-1): Ninth circuit judgment reversed and matter remanded.

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Equity

See also Contract Law: *Vestergaard Frandsen A/S and others v Bestnet Europe Ltd and others*

See also Industrial Law: *US Airways Inc. v McCutchen*

Pitt and another v The Commissioners for Her Majesty's Revenue and Customs

Supreme Court of the United Kingdom: [2013] UKSC 26.

Judgment delivered: 9 May 2013

Coram: Lord Neuberger PSC, Lord Walker, Lady Hale, Lord Mance, Lord Clarke, Lord Sumption and Lord Carnwath JJSC.

Catchwords:

> Equity — Mistake — Application to set aside — Receiver created discretionary trust and settled proceeds of patient's damages claim on it for his future care — Receiver failed to take into account inheritance tax consequences when establishing settlement — Whether equitable relief for consequences of mistake available.
>
> Equity – Trusts – Trustee — Duty of trustee — Trustees on advice exercised discretionary powers of enlargement and advancement for purpose of avoiding potential capital gains tax liability — Advisers gave incorrect advice on capital gains tax consequences of transaction — Whether court to set aside transactions as ineffective.

Held: The Court unanimously (i) dismissed the appeal in *Futter*, and the appeal in *Pitt*, so far as they turned on the rule in *Hastings-Bass*, (ii) allowed the appeal in *Pitt* on the ground of mistake.

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Bullock v BankChampaign, N.A.

Supreme Court of the United States: Docket No 11-1518.

Judgment delivered: 13 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Equity – Fiduciary duties – Beneficiaries of a trust obtained a judgment against petitioner trustee of the trust that the trustee breached fiduciary duties by borrowing money from the trust for

personal gain – Non-professional trustee contended that all loans were repaid with interest – Trustee contended further that trustee was improperly denied a discharge of the debt to the trust for the trustee's personal gain based on fiduciary defalcation without any finding of wrongful intent or loss to the trust principal – Whether "defalcation" in § 523(a)(4) requires a mental state of "gross recklessness" in respect to the improper nature of the fiduciary behaviour.

Held (9-0): Appeal allowed, judgment vacated and case remanded.

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Prest v Petrodel Resources Limited & Others

Supreme Court of the United Kingdom: [2013] UKSC 34.

Judgment delivered: 12 June 2013

Coram: Lord Neuberger PSC, Lord Walker, Lady Hale, Lord Mance, Lord Clarke, Lord Wilson and Lord Sumption JJSC.

Catchwords:

Equity – Transfer of property — Properties held by companies controlled by husband — Husband ordered to transfer properties to wife or to cause them to be so transferred — Whether property to which husband "entitled" — Whether conditions for piercing companies' corporate veils established — Whether conditions different in matrimonial proceedings — Whether jurisdiction to order husband to transfer properties held by companies to wife.

Family law – Husband and wife – Transfer of property - Properties held by companies controlled by husband — Husband ordered to transfer properties to wife or to cause them to be so transferred –

Corporations law - Whether conditions for piercing companies' corporate veils established.

Held: Appeal allowed (unanimous). The seven disputed properties vested in the companies are held on trust for the husband on the ground (which was not considered by the courts below) that, in the particular circumstances of the case, the properties were held by the husband's companies on a resulting trust for the husband, and were accordingly "property to which the [husband] is entitled, either in possession or reversion.

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Nishi v Rascal Trucking Ltd.

Supreme Court of Canada: [2013] SCC 33.

Judgment delivered: 13 June 2013.

Coram: McLachlin CJ, LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

Catchwords:

> Equity – Trusts – Purchase money resulting trust – Appellant used funds received from respondent to purchase property in appellant's own name – Funds represented disputed monies owed to third party – Whether purchase money resulting trust should be abolished in commercial transactions in favour of unjust enrichment principles – Whether a transfer is gratuitous when it constitutes the discharge of a legal and moral obligation to a third party – Whether a proportionate interest in the property is acquired where the transferor attempted, but failed to secure the title holder's agreement to an interest in the property – Whether presumption of resulting trust was rebutted.

Held: Appeal allowed. There is no reason to depart from the long standing doctrine of the purchase money resulting trust in favour of an approach based on unjust enrichment.

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Evidence

See also Constitutional Law: *Salinas v Texas*

Hannigan v The Queen

Supreme Court of New Zealand: [2013] NZSC 41.

Judgment delivered: 26 April 2013.

Coram: Elias CJ, McGrath, William Young, Chambers and Glazebrook JJ.

Catchwords:

> Evidence – Evidence Act 2006, ss 94 and 37(4) – Appellant found guilty of setting fire to his home on 21 June 2009 in order to generate an insurance claim – Convicted of arson – At trial the Crown alleged the appellant had also set fire to the kitchen on 14 and 20 June 2009 – Appellant's wife gave testimony inconsistent with earlier statement she had given to the police – Due to inconsistency the Judge allowed the Prosecutor to re-examine the appellant's wife – Appellant alleged re-examination was in the

nature of a cross-examination and amounted to attack on her veracity which should not have been allowed in absence of a determination of hostility – Whether re-examination was lawful.

Held: Appeal dismissed (Elias CJ dissenting). The Judge was entitled to permit the prosecutor to examine Mrs Hannigan on the 26 June statement under s 89(1)(c) of the Act and that the questioning did not require a determination of hostility under s 94. On the second issue, the majority found that the prosecutor was not challenging Mrs Hannigan's veracity. Rather, he was challenging the accuracy of her evidence and putting before the jury the substance of what she had said to the police in her prior statement. The restriction in s 37(4) was thus inapplicable. The majority also found that the exclusionary provisions which form part of the veracity rules are not applicable to evidence which is directly relevant to facts in issue in a trial.

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Public Prosecution Service of Northern Ireland v Elliott and another

Supreme Court of the United Kingdom: [2013] UKSC 32.

Judgment delivered: 22 May 2013

Coram: Lord Neuberger PSC, Lady Hale, Lord Mance, Lord Kerr and Lord Hughes JJSC.

Catchwords:

Evidence - Admissibility - Defendants' fingerprints taken on electronic device at police station - Device not approved by Secretary of State in accordance with statutory provision - Whether resulting fingerprint evidence admissible at trial.

Held: Appeal dismissed (unanimous).

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Nevada v Jackson

Supreme Court of the United States: Docket No 12-694.

Judgment delivered: 3 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Evidence – Testimony – Credibility – Respondent inmate sought to introduce evidence attempting to show his rape victim's accusation of his prior assault could not be substantiated by police – Initial court excluded this evidence – Decision revered by Court of Appeal for the Ninth Circuit – Whether evidence should be admitted.

Held (9-0): Appeal allowed.

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Family Law

See also Equity: *Prest v Petrodel Resources Limited & Others*

In re B (A Child) (Care Proceedings: Threshold Criteria)

Supreme Court of the United Kingdom: [2013] UKSC 33.

Judgment delivered: 12 June 2013

Coram: Lord Neuberger PSC, Lady Hale, Lord Kerr, Lord Clarke and Lord Wilson JJSC.

Catchwords:

Family law — Care proceedings — Threshold conditions — Local authority found child's parents evasive and obstructive with care team and brought care proceedings in respect of child — Judge found threshold conditions established and made care order — Whether child "likely to suffer significant harm" — Whether appropriate to make care order — Approach of appellate court on appeal.

Held: Appeal dismissed (Lady Hale dissenting).

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Adoptive Couple v Baby Girl

Supreme Court of the United States: Docket No 12-399.

Judgment delivered: 25 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Family law – Indian Child Welfare Act 1978 – Act established federal standards for state-court child custody proceedings involving Indian children – Act bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child 25 U. S. C. §1912(f) – §1912(d) conditions involuntary termination of parental rights on a showing that remedial effects have been made to prevent the "breakup of the Indian family" – Biological father, a member of the Cherokee Nation) ended relationship with pregnant birth mother and agreed to relinquish his parental rights – Birth mother put Baby Girl up for adoption – Baby Girl adopted by non-Indian couple in South Carolina – For duration of pregnancy and first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl – Biological Father subsequently sought custody – Biological Father awarded custody under ICWA – Whether §1912(f) nor §1912(d) bars the termination of parental rights – Whether Act applies to Indian fathers who were never custodians of the child.

Held (5-4): Appeal allowed, case reversed and remanded. Neither §1912(f) nor §1912(d) bars the termination of parental rights. Baby Girl adopted by non-Indian South Carolina couple.

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Human Rights Law

See also Constitutional Law: *Salvesen v Riddell and Another (Lord Advocate intervening) (Scotland)*

Regina (Faulkner) v Secretary of State for Justice and another

Supreme Court of the United Kingdom: [2013] UKSC 23.

Judgment delivered: 1 May 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Kerr, Lord Reed and Lord Carnwath JJSC.

Catchwords:

Human rights law – Liberty – Just satisfaction – Claimants serving life imprisonment or indeterminate sentence of imprisonment for public protection – Claimants' cases referred to Parole Board prior to expiry of minimum term – Review delayed in breach of claimants' Convention right – Whether false imprisonment if

claimants would have been at liberty but for delay – Whether award of damages for breach of Convention right appropriate – Whether declaration sufficient to afford just satisfaction.

Held: The Court allowed the Board's appeal in Mr Faulkner's case, reduce the damages awarded to him to £6,500, and dismissed his cross-appeal. The Court granted Mr Sturnham permission to appeal and allowed his appeal.

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O'Neill; Lauchlan v HM Advocate (No 2) (Scotland)

Supreme Court of the United Kingdom: [2013] UKSC 36.

Judgment delivered: 13 June 2013

Coram: Lord Hope DPSC, Lord Kerr, Lord Wilson, Lord Hughes and Lord Toulson JJSC.

Catchwords:

Human rights law — Fair trial — Reasonable time requirement — Defendants interviewed under caution — Formal proceedings not commenced until five years later — Whether defendants "charged" at conclusion of interview under caution — Date from which reasonable time to be assessed — Whether breach of reasonable time guarantee.

Criminal law – Fair trial – Reasonable time requirement.

Held: The court determines the two compatibility issues as follows: (1) that the date when the reasonable time began for the purposes of the appellants' article 6(1) Convention right was 5 April 2005; and (2) that the Lord Advocate's act in proceeding with the trial on the murder charges was not incompatible with the appellants' article 6(1) right to a trial before a tribunal that was independent and impartial. Proceedings remitted to the High Court of Justiciary.

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Smith; Ellis; Allbut and others v Ministry of Defence (JUSTICE and another intervening)

Supreme Court of the United Kingdom: [2013] UKSC 41.

Judgment delivered: 19 June 2013

Coram: Lord Hope DPSC, Lady Hale, Lord Mance, Lord Kerr, Lord Wilson, Lord Carnwath and Lord Walker JJSC.

Catchwords:

> Human rights law — Life — Soldiers on active service abroad — Soldiers serving in Iraq killed by improvised explosive devices while driving patrol vehicles — Whether within scope of United Kingdom's Convention jurisdiction — Whether Convention right to life extends to soldiers on active service outside British territory.
>
> Torts – Negligence – Duty of care — Soldiers serving overseas — Soldiers serving in Iraq killed by improvised explosive devices while driving Snatch Land Rover patrol vehicles or killed or injured inside tank when attacked by friendly fire — Whether state owes serving solders a duty of care in providing equipment subsequently used in conflict — Whether claim relating to procurement of equipment and adequacy of training justiciable — Whether defence of combat immunity available.

Held: The Supreme Court held unanimously that in relation to the Snatch Land Rover claims, Pte Hewett and Pte Ellis were within the UK's jurisdiction for the purposes of the Convention at the time of their deaths. By majority (Lords Mance, Wilson and Carnwath dissenting), the Court holds that: (i) the Snatch Land Rover claims should not be struck out on the ground that the claims are not within the scope of article 2 of the Convention; and (ii) the Challenger claims and Ellis negligence claim should not be struck out on the ground of combat immunity or on the ground that it would not be fair, just or reasonable to extend the MoD's duty of care to those cases.

The effect of the Court's decision is that all three sets of claims may proceed to trial.

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Industrial Law

Verma v Barts and the London NHS Trust

Supreme Court of the United Kingdom: [2013] UKSC 20.

Judgment delivered: 24 April 2013

Coram: Lord Hope DPSC, Lord Walker, Lady Hale, Lord Sumption and Lord Carnwath JJSC.

Catchwords:

> Industrial law – Employment – Wages – Pay protection – Part-time employment – Part-time locum doctor paid per session worked took up full-time salaried training post at lower rate of pay – Terms and conditions of employment provided for pay

protection – Whether protection is limited to previous actual earnings or required new full time hours to be paid at previous part-time hourly rate.

Held: Appeal allowed (unanimous). The case is remitted to the Employment Tribunal in order to determine the outstanding issues identified in the order of the Employment.

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US Airways Inc. v McCutchen

Supreme Court of the United States: Docket No 11-1285.

Judgment delivered: 16 April 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Industrial law – Pensions and benefits – Employment Retirement Income Security Act ("ERIS Act") – Employee injured in automobile accident received $66,866 in medical expenses – Employee sued tortfeasor and received $66,000 after legal fees – Employer sued employee for reimbursement of $66,866 in medical expenses – Whether employer allowed to enforce reimbursement provision it its health benefits plan.

Equity – unjust enrichment – Whether employee who receives benefits paid under ERIS Act and legal action is unjustly enriched – Whether form of double recovery

Held (5-4): Third Circuit's decision vacated, case remanded.

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The President of the Methodist Conference v Preston

Supreme Court of the United Kingdom: [2013] UKSC 29.

Judgment delivered: 15 May 2013

Coram: Lord Hope DPSC, Lady Hale, Lord Wilson, Lord Sumption and Lord Carnwath JJSC.

Catchwords:

Industrial law – Labour law – Employment - Contract of employment - Church minister - Methodist minister appointed to group of congregations - Minister received stipend and

accommodation and liable to disciplinary action - Whether intention to create legal relations - Whether "employee" for purposes of unfair dismissal.

Held: Appeal allowed (Lady Hale dissenting). Employment Tribunal dismissing Ms Preston's claim restored.

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Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.

Supreme Court of Canada: [2013] SCC 34.

Judgment delivered: 14 June 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

Industrial law – Arbitration – Collective agreements – Management rights – Privacy – Employer unilaterally imposed mandatory random alcohol testing policy for employees – Whether unilaterally implementing random testing policy a valid exercise of employer's management rights under collective agreement – Whether employer could unilaterally implement policy absent reasonable cause or evidence of workplace alcohol abuse.

Administrative law – Judicial review – Standard of review of labour arbitration board's decision – Employer unilaterally imposed mandatory random alcohol testing policy for employees holding safety-sensitive positions – Whether arbitration board's decision that harm to employees' privacy outweighed policy's benefits to employer was reasonable.

Held: Appeal allowed (McLachlin CJ, Rothstein and Moldaver JJ dissenting).

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Vance v Ball State University

Supreme Court of the United States: Docket No 11-556.

Judgment delivered: 24 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Industrial law – Labour law – Discrimination – Harassment – Petitioner employee sued respondent employer alleging a racially hostile work environment in violation of the Civil Rights Act 1964 – District court entered summary judgment in favour of the employer – United States Court of Appeals for the Seventh Circuit affirmed – Whether work colleague without the power to hire, fire, demote, promote, transfer, or discipline employee is a "supervisor" for purposes of vicarious liability.

Held (5-4): The Supreme Court affirmed the appellate court's judgment.

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University of Texas Southwestern Medical Center v Nassar

Supreme Court of the United States: Docket No 12-484.

Judgment delivered: 24 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Industrial law – Labour law – Civil Rights Act 1964 – Discrimination – Retaliation – Respondent, former faculty member of appellant university, alleged employer denied him a job in retaliation for a prior resignation letter alleging race discrimination in the workplace –Whether respondent must show that retaliation was the sole motivating factor, or a motivating factor but not necessarily the only one

Held (5-4): Judgment vacated and remanded. Retaliation must be the "sole factor".

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Insurance Law

Hillman v Maretta

Supreme Court of the United States: Docket No 11-1221.

Judgment delivered: 3 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Insurance law – Life insurance – Federal Employees' Group Life Insurance Act 1954 (FEDLIA) – FEGLIA created a scheme that gave the highest priority to an insured's designated beneficiary and underscored that an employee's right of designation could not be waived or restricted – Petitioner widow filed an action in a Virginia circuit court, seeking a determination that respondent, her deceased husband's former spouse, had an obligation under Va. Code Ann. § 20-111.1 to transfer life insurance proceeds she received to the widow – Whether § 20-111.1 was pre-empted by FEGLIA provision.

Held (9-0): Appeal dismissed. § 20-111.1 was pre-empted by FEGLIA provision.

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Intellectual Property

Bowman v Monsanto Co.

Supreme Court of the United States: Docket No 11-796.

Judgment delivered: 13 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Intellectual property – Patents – Respondent patent holder sued petitioner farmer for infringing its patents on a soybean seed – Farmer raised patent exhaustion as defence, arguing that the holder could not control his use of the soybeans because they were the subject of a prior authorised sale – Whether a farmer who bought patented seeds can reproduce them through planting and harvesting without the patent holder's permission

Held (9-0): Appeal dismissed, judgment affirmed. Under the patent exhaustion doctrine, the farmer could have (1) resold the patented soybeans he purchased from the grain elevator, (2) consumed the beans himself, or (3) fed them to his animals. But the exhaustion doctrine did not enable the farmer to make additional patented soybeans without the holder's permission (either express or implied).

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Association for Molecular Pathology v Myriad Genetics, Inc.

Supreme Court of the United States: Docket No 12-398.

Judgment delivered: 13 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Intellectual property – Patents – Respondent laboratory isolated genes, mutations of which increased the risk of ovarian and breast cancer and synthetically created cDNA containing only the genetic code for amino acids – Laboratory's patents granted the laboratory the exclusive rights to develop medical tests for detecting DNA mutations and assessing a patient's cancer risk – Petitioners, medical patients, advocacy groups, and doctors, brought an action against laboratory seeking a declaration that the laboratory's patents for isolating deoxyribonucleic acid (DNA) in genes and creating composite DNA (cDNA) were invalid.

Held (9-0): A naturally occurring DNA segment was a product of nature and not patent eligible under 35 U.S.C.S. § 101 merely because it was isolated, but cDNA was patent eligible because it was not naturally occurring. In isolating the genes, the laboratory found important and useful genes but did not create or alter either the genetic information encoded in the genes or the genetic structure of the DNA, and the location and order of the genetic sequences existed in nature before the laboratory isolated them. However, cDNA which removed codes for anything other than amino acids was not a product of nature and was patent eligible since the removal of the unwanted codes unquestionably created something new.

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FTC v Actavis, Inc.

Supreme Court of the United States: Docket No 12-416.

Judgment delivered: 17 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan JJ.

Catchwords:

> Intellectual property – Patents – Federal Trade Commission ("FTC") sued respondents, a patent holder and generic drug manufacturers, alleging that respondents reverse payment settlement agreement violated the Federal Trade Commission Act and antitrust laws – Whether FTC lawsuit should proceed.

Competition law – Whether reverse payment settlement agreement violated antitrust law.

Held (5-3): Appeal allowed, case remanded for further proceedings.

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International Law

Kiobel v Royal Dutch Petroleum Co.
Supreme Court of the United States: Docket No 10-1491.

Judgment delivered: 17 April 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

International law – Conflict of laws – Jurisdiction – Alien Tort Statute – Petitioner Nigerian nationals sued respondents under the ATS alleging corporation aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria – Whether the law of nations recognises corporate liability – Whether the ATS rebutted the presumption against extraterritoriality.

Held (9-0): Appeal dismissed,

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Judgments and Orders

See also Torts: *Cojocaru v British Columbia Women's Hospital and Health Centre*

Legal Services

Maracich v Spears
Supreme Court of the United States: Docket No 12-25.

Judgment delivered: 17 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Legal services – Marketing - Attorneys sent letters to the owners seeking their participation in a lawsuit against car dealers for unfair practices – Whether use of owners' personal information was in connection with, or investigation in anticipation of, litigation.

Held (5-4): The judgment holding that the attorneys properly obtained the owners' personal information was vacated, and the case was remanded for further proceedings.

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Local Government

Westminster City Council v SL (FC)
Supreme Court of the United Kingdom: [2013] UKSC 27.

Judgment delivered: 9 May 2013

Coram: Lord Neuberger PSC, Lady Hale, Lord Mance, Lord Kerr and Lord Carnwath JJSC.

Catchwords:

> Local government – Community care services - Provision of accommodation - Claimant homeless and destitute failed asylum seeker - Claimant suffered depression and severe mental health difficulties - Local authority assessed claimant's needs and provided support through care co-ordinator - Whether claimant in need of "care and attention which is not otherwise available" - Whether local authority obliged to provide claimant with residential accommodation.

Held: The Supreme Court allowed the appeal, concluding that the Council does not owe a duty to provide SL with accommodation.

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Property Law

Tarrant Regional Water District v Herrmann

Supreme Court of the United States: Docket No 11-889.

Judgment delivered: 13 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Property law – Water rights – Petitioner Texas regional water district sued respondent Oklahoma Water Resources Board ("OWRB"), seeking an order enjoining the OWRB from enforcing Oklahoma statutes which prohibited the Texas water district from drawing water out of a river that was located in Oklahoma – Petitioner claimed that portions of Okla. Stat. tit. 82, §§ 105.12 and 105.12A which created a permit review process that applied only to out-of-state water users were pre-empted by the Red River Compact, Act of Dec. 22, 1980, 94 Stat. 3305, and that the district had the right under the Compact to take water from the Kiamichi River, a tributary of the Red River that was located in Oklahoma – Whether Oklahoma Statute was pre-empted by the Compact.

Held (9-0): Appeal dismissed. The Supreme Court interpreted § 5.05(b)(1) of the Compact and found that nothing in § 5.05(b)(1) or any other section of the Compact allowed Texas to take water that was located within Oklahoma without obtaining permission from Oklahoma, and because the Compact did not create cross-border rights, Oklahoma statutes which regulated out-of-state water users were not pre-empted by the Compact.

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Cusack v Harrow London Borough Council

Supreme Court of the United Kingdom: [2013] UKSC 40.

Judgment delivered: 19 June 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Sumption, Lord Carnwath and Lord Hughes JJSC.

Catchwords:

> Property — Duty to maintain highway — Highway authority — Compensation – Restriction of private access to highway — Frontager driving across footway to and from highway — Highway authority proposed to erect safety barriers preventing vehicular access from frontager's forecourt to highway — Whether authority has statutory power to erect barriers — Whether frontager entitled to injunction to prevent works or

compensation — Whether blocking of vehicular access to property breaching right to peaceful enjoyment of possessions.

Held: Appeal allowed (unanimous). A highway authority has power under s 80 of the Highways Act 1980 to erect barriers so as to prevent vehicular access to a frontager's forecourt, without paying compensation, in order to safeguard users of the highway.

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Koontz v St. Johns River Water Management District
Supreme Court of the United States: Docket No 11-1447.

Judgment delivered: 25 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Property – Eminent domain – Taking – Petitioner owner of a vacant lot consisting of 14.9 acres – Under Florida regulations all but 1.4 acres is a Riparian Habitat Zone unable to be developed without permission from respondent water management district – Petitioner applied for permit to develop 3.7 acres of the property – Respondent approved permit on condition that petitioner either deed remainder of property as a conservation zone and performs offsite mitigation or reduce development to 1 acre and turn the remaining 13.9 acres into a deed-restricted conservation area – Petitioner refused – Whether government can be held liable for taking when it refuses to issue a land-use permit on sole basis that the permit applicant did not accede a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan* and *Dolan*.

Held (5-4): Appeal allowed; *Nollan* and *Dolan* applicable, government can be held liable.

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Public Health and Welfare Law

Wos v E.M.A.
Supreme Court of the United States: Docket No 12-98.

Judgment delivered: 20 March 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Public health and welfare law – Social security – Medicaid – State plan – Respondents filed an action seeking a judgment declaring that North Carolina General Statute § 108A-57(a) violated the anti-lien provision of the Medicaid Statute – Parents, received $1.9 million in Medicaid benefits from the State of North Carolina after their daughter was born with multiple serious birth injuries that required her to receive between 12 and 18 hours of skilled nursing care each day – Parents sued doctor and hospital alleging malpractice – Lawsuit settled for $2.8 million – Whether 42 U.S.C.S. § 1396p(a)(1) pre-empted § 108A-57(a)'s irrebuttable presumption that one-third of a tort recovery was attributable to a Medicaid beneficiary's medical expenses

Held (6-3): Appeal dismissed.

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Sebelius v Cloer

Supreme Court of the United States: Docket No 12-236.

Judgment delivered: 20 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Public health and welfare law – Healthcare – Communicable diseases – Respondent claimant filed a petition for compensation under the National Childhood Vaccine Injury Act 1986 – Claim denied as untimely – Court of Appeals for the Federal Circuit granted claimant's motion for an award of attorney's fees – Whether Court of Appeals decision should stand.

Held (9-0): Appeal dismissed.

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Statutory Interpretation

See also Constitutional Law: *Frank Nabolisa v The State*

See also Constitutional Law: *Horne v Department of Agriculture*

Jacobus Johannes Liebenberg NO and Others v Bergrivier Municipality (Minister for Local Government and Environmental Affairs and Development Planning, Western Cape intervening

Constitutional Court of South Africa: [2013] ZACC 16.

Judgment delivered: 6 June 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Cameron, Froneman, Khampepe, Jafta, Nkabinde, Skweyiya, Van der Westhuizen, Zondo and Yacoob JJ.

Catchwords:

> Statutory interpretation – Over a period of 8 years the applicants failed to pay certain levies and property rates imposed by the municipality – Municipality sought to enforce payment – Applicants disputed the validity and lawfulness of the charges – Whether the imposts were valid.

Held: Appeal dismissed (Jafta J dissenting). The Municipality had properly imposed the rates in terms of section 10G(7) of the Transition Act for the 2006/2007 to 2008/2009 financial years. In respect of the challenges to the other years, the Municipality had substantially complied with the relevant statutory requirements.

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Taxation

WHA Limited and another v Her Majesty's Revenue and Customs

Supreme Court of the United Kingdom: [2013] UKSC 24.

Judgment delivered: 1 May 2013

Coram: Lord Hope DPSC, Lord Walker, Lord Mance, Lord Reed and Lord Carnwath JJSC.

Catchwords:

> Taxation – VAT – Supply of insurance exempt from VAT – However insurers bear VAT element of costs incurred in course of their business which are chargeable to VAT as they are unable to deduct that VAT element from any VAT they have received – Whether scheme designed to minimise liability to VAT valid.

Held: Appeal dismissed (unanimous). Scheme invalid.

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PPL Corp. v Commissioner

Supreme Court of the United States: Docket No 12-43.

Judgment delivered: 20 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Taxation – International taxation – Petitioner domestic corporate taxpayer challenged the determination of respondent Commissioner of Internal Revenue which disallowed the taxpayer's claimed credit for a windfall tax imposed by the United Kingdom – Whether the windfall tax was creditable as a foreign excess profits tax, or not as a valuation adjustment.

Held (9-0): Appeal allowed. Windfall tax was creditable.

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Daishowa-Marubeni International Ltd v Canada

Supreme Court of Canada: [2013] SCC 29.

Judgment delivered: 23 May 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Taxation – Income tax – Proceeds of disposition – Sale of forest tenures – Reforestation obligations imposed on forest tenures – Value of reforestation obligations not included in vendor's proceeds of disposition for tax purposes – Whether reforestation obligations should be included in vendor's proceeds of disposition for tax purposes – Whether reforestation obligations are distinct debts – Whether reforestation obligations are contingent liabilities – Whether contracting parties agreeing to specific value for future reforestation obligations relevant for tax purposes.

Held: Appeal allowed and matter remitted to the Minister for reassessment. DMI was not required to include the estimated cost of reforestation in its "proceeds of disposition" for income tax purposes.

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Torts

See also Human Rights Law: *Smith; Ellis; Allbut and others v Ministry of Defence (JUSTICE and another intervening)*

Willoughby v Hayes (FC)

Supreme Court of the United Kingdom: [2013] UKSC 17.

Judgment delivered: 20 March 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Wilson, Lord Sumption and Lord Reed JJSC.

Catchwords:

> Torts – Cause of action – Harassment – Appellant made persistent unfounded allegations against respondent over seven years to authorities investigating crime – Authorities failed to find evidence of crimes apparently committed by respondent – Respondent sought injunctive relief on ground that conduct amounted to harassment – Whether course of conduct pursued by appellant "for the purpose of preventing or detecting crime" – Whether to be assessed on subjective or objective basis or by reference to rationality of appellant's decision to engage in conduct complained of.

Held: Appeal dismissed (Lord Reed JSC dissenting).

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Millbrook v United States

Supreme Court of the United States: Docket No 11-10362.

Judgment delivered: 27 March 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Torts – Public entity liability – Federal Tort Claims Act – Petitioner federal prisoner sued the United States under the Act alleging assault and battery by federal correctional officers – Whether the "law enforcement proviso" under 28 U.S.C.S. § 2680(h) applies

only to torts during executing a search, seizing evidence or arrests.

Held (9-0): Appeal allowed.

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Cassidy Alexis Ediger, an infant by her Guardian Ad Litem, Carolyn Grace Ediger v Johnston

Supreme Court of Canada: [2013] SCC 18.

Judgment delivered: 4 April 2013.

Coram: McLachlin CJ, LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

Torts – Negligence – Causation – Doctor attempted mid-level forceps delivery of baby – Baby's umbilical cord became compressed causing bradycardia and brain injury – Doctor did not arrange for back-up Caesarean section delivery or advise mother of mid-level forceps delivery risks prior to attempting forceps delivery – Whether doctor's attempted forceps delivery caused bradycardia – Whether doctor's failure to arrange for back-up Caesarean section delivery or to advise mother of mid-level forceps delivery risks prior to attempting forceps delivery caused baby's injury.

Held: Appeal allowed (unanimous). The sole issue here is causation: Did the doctor's breaches of the standard of care cause the baby's injury? Because causation is a factual inquiry, the standard of review for the trial judge's causation findings is palpable and overriding error. There was no such error here.

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Cojocaru v British Columbia Women's Hospital and Health Centre

Supreme Court of Canada: [2013] SCC 30.

Judgment delivered: 23 May 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

Torts – Negligence – Causation – Health law – Consent to care – Failure to inform – Plaintiffs alleged defendants were negligent in failing to obtain informed consent to vaginal birth after caesarean section or to prostaglandin induction and in failing to attend to plaintiff – Plaintiffs alleged lack of proper care resulted in ruptured uterus and son born with brain damage – Whether trial judge's conclusion on liability of various defendants disclose palpable errors of fact or legal errors and should be set aside.

Judgments and orders – Reasons – Trial judge delivered reasons for judgment consisting of reproduction of plaintiffs' written submissions – Whether trial judge's decision should be set aside because reasons for judgment incorporated large portions of material prepared by others.

Held: Appeal and cross-appeal allowed.

Taking full account of the complexity of the case, and accepting that it would have been preferable for the trial judge to discuss the facts and issues in his own words, it cannot be concluded that the trial judge failed to consider the issues and make an independent decision on them.

However, aspects of the reasons disclose palpable and overriding error and must be set aside. The trial judge's findings of liability against Nurse Bellini, the Hospital, Dr Steele and Dr Edris must be set aside.

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Transportation Law

Dan's City Used Cars, Inc. v Pelkey

Supreme Court of the United States: Docket No 12-52.

Judgment delivered: 13 May 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Transportation law – Interstate commerce – Federal pre-emption – Respondent owner of a vehicle brought an action against petitioner towing company alleging violation of state tort and statutory law in storing and disposing of the vehicle – Whether federal pre-emption of state laws related to a service of any motor carrier with respect to the transportation of property applied to bar the owner's state-law claims

Held (9-0): Appeal dismissed.

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American Trucking Associations, Inc. v Los Angeles
Supreme Court of the United States: Docket No 11-798.

Judgment delivered: 13 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Transportation law – Interstate commerce – Federal pre-emption – Petitioner trade association sued respondents, a city and a port, contending that the Federal Aviation Administration Authorisation Act of 1994 expressly pre-empted provisions in a concession agreement – Whether provisions in the concession agreement which compelled a company to affix a placard on each truck with a phone number for reporting concerns and to submit a plan listing off-street parking locations for each truck when not in service were pre-empted.

Held (9-0): The U.S. Supreme Court determined that 49 U.S.C.S. § 14501(c)(1) expressly pre-empted the agreement's placard and parking provisions because those requirements had the force and effect of law since the agreement functioned as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment.

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Tribal Customary Law

Mayelane v Ngwenyama and Another
Constitutional Court of South Africa: [2013] ZACC 14.

Judgment delivered: 30 May 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Cameron, Froneman, Khampepe, Jafta, Nkabinde, Skweyiya, Yacoob and Zondo JJ.

Catchwords:

> Tribal customary law – Family law – Applicant married husband in 1984 under Tsonga customary law – Marriage not registered – After husband died the applicant was informed that her husband had purported to conclude a second customary marriage with the first respondent – Applicant did not consent to second marriage –

Whether absence of a first wife's consent to her husband's subsequent polygynous marriages affects the validity of the latter marriages.

Held: Appeal allowed (Zondo J on different reasons; Jafta J (with Mogoeng CJ and Nkabinde J concurring) without development of Tsonga law). Tsonga customary law required that the first wife be informed of her husband's subsequent customary marriage. The first respondent's marriage was invalid because the applicant had not been informed. Consistent with the Courts obligations to develop living customary law, Tsonga customary law now requires the consent of the first wife for a subsequent marriage.

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Justice Mpondombini Sigcau v President of the Republic of South Africa and Others

Constitutional Court of South Africa: [2013] ZACC 18.

Judgment delivered: 13 June 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Froneman, Jafta, Nkabinde, Skweyiya, Van der Westhuizen, Zondo JJ and Mhlantla AJ.

Catchwords:

Tribal customary law – Dispute about the rightful King of the AmaMpondo AseQawukeni – Applicant succeeded his father as Paramount Chief of the AmaMpondo AseQawukeni in 1978 – The Traditional Leadership and Governance Framework Act (the "Act") subsequently amended – Fourth respondent sought declaration that he was the rightful King – Commission on Traditional Leadership Disputes and Claims investigated and concluded claim was valid, recommended to the President issue a notice to confirm the claim – Applicant sought review on basis that the President erred in issuing the notice under the amended Act – Under the original Act the President would have had to refer the matter to the existing Royal Family before deciding whether to recognise the new King – Whether the notice should have been issued under the original or amended Act.

Held: Appeal allowed (unanimous). Because of material difference between the original and amended Acts, it cannot be said that a notice issued under the amended Act can be taken to have been issued under the original Act. The President therefore purported to exercise powers not conferred on him by the provisions of the amended Act.

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