SHORT PARTICULARS OF CASES
APPEALS

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KERAMIANAKIS & ANOR v REGIONAL PUBLISHERS PTY LTD (S311/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 21 December 2007

Date of grant of special leave: 13 June 2008

Dr Keramianakis and Dr Smagarinsky ("the Doctors") are medical practitioners who established the “Dubbo Skin Cancer Centre”. Regional Publishers Pty Ltd ("Regional Publishers") is the publisher of the *"Daily Liberal"*. On 22 March 2001 an article ("the article") was published in the *Daily Liberal* entitled “Claims skin clinic misleading public”.

The Doctors brought defamation proceedings against Regional Publishers, alleging that the article gave rise to the following three imputations:

(a) that the Doctors as medical practitioners were more concerned with making money than with the well-being of their patients;
(b) that the Doctors were medical practitioners who had misled the public;
(c) that the Doctors as medical practitioners had charged excessive fees for medical services.

In the District Court, the jury found that the article gave rise to imputations (b) and (c), in relation to Dr Smagarinsky but not to Dr Keramianakis. It also found that imputation (a) was not made out in relation to either Doctor.

On 21 December 2007 the Court of Appeal (Beazley & Basten JJA, Rothman J) unanimously dismissed the Doctors' appeal. Their Honours found that it was open to the jury to distinguish between imputation (a) and imputations (b) and (c). There was therefore no basis for holding that there was manifest unreasonableness in the jury’s answers. It was also open to the jury to find that imputation (a) was not conveyed by the article when read as a whole.

The Court of Appeal did however hold that the directions given to the jury were potentially confusing. Notwithstanding this, it was apparent that in upholding imputations (b) and (c) in relation to Dr Smagarinsky, but not (a), the jury was reading the article as a whole, in a legally appropriate manner.

A majority (Beazley & Basten JJA agreeing, Rothman J dissenting) further held that the right of appeal was never available in relation to a jury verdict in the District Court. It was only available from the ruling, order, direction or decision of a judge on a point of law or upon a question of evidence.

The grounds of appeal are:

- The Court of Appeal erred in holding that it lacked jurisdiction under section 127 of the *District Court Act* 1973 (NSW) to hear an appeal from a civil trial before a judge and jury in the District Court of New South Wales.

- The Court of Appeal erred in failing to find that a reasonable jury properly instructed could not have arrived at the jury's decisions with regard to the imputations pleaded in paragraphs 13(a) and 14(a) of the Third Further Amended Ordinary Statement of Claim.

On 15 July 2008 the Respondent filed a notice of cross-appeal, the ground of which is:

- The Court of Appeal erred in holding, at paragraphs 103 and 104 of the judgment of Basten JA, that in the circumstances of the present case, if the Court of Appeal had jurisdiction to entertain the appeal, it had power to direct a verdict and enter judgment for the First Cross-Respondent in relation to imputations (b) and (c).

On 15 July 2008 the Respondent filed a notice of contention, the grounds of which include:

- The Court of Appeal erred in finding that the Appellants were entitled to raise on appeal, in support of an order for a verdict and judgment, or alternatively a new trial, matters not raised at the trial in first instance.

PARKER v COMPTROLLER-GENERAL OF CUSTOMS (S317/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 6 December 2007

Date of grant of special leave: 30 June 2008

In the late 1980's Australian Customs Service ("ACS") officers conducted an investigation into suspected breaches of both the *Spirits Act* 1906 (Cth) and the *Customs Act* 1901 (Cth) ("the Customs Act"). Those suspected breaches involved certain importers of brandy who had been “extending” the product with locally produced alcohol on which duty had not been paid. Three main businesses suspected of involvement were: Lawpark Pty Ltd ("Lawpark"), an importer and distributor of spirits; Kingswood Distillery Pty Ltd, a maker and processor of spirits; and Breven Pty Ltd ("Breven"), the operator of a bond store at which imported spirits were warehoused. Mr Parker was both a director and shareholder of Lawpark and Breven.

In March 1990 ACS officers executed search warrants issued under the Customs Act. Mr Parker was later charged with offences under sections 33 and 234 of the Customs Act. Mr Parker sought to have certain documents excluded pursuant to section 138 of the *Evidence Act* 1995 (NSW) ("Evidence Act"). A voir dire was conducted and on 8 May 2006 Justice Simpson held that the evidence should be admitted. Mr Parker was convicted, largely on the basis of an analysis of those seized documents. The present matter is brought from that interlocutory judgment of Justice Simpson.

On 6 December 2007 the Court of Appeal (Mason P, Basten & Tobias JJA) unanimously dismissed Mr Parker's appeal. Their Honours held that the primary consideration when deciding upon the admissibility of unlawfully or improperly obtained evidence is whether there has been a deliberate (as opposed to an accidental or inadvertent) disregard for the law. They found that the notice to produce documents (addressed to Mr Parker) was insufficiently precise to identify the goods in question. It was therefore invalid and purported reliance upon it engaged section 138 of the Evidence Act. Their Honours however held Mr Parker had failed to establish any willful disregard for the law, dishonest motive or improper purpose on the part of the ACS. Furthermore, no error had been established in the reasons provided by Justice Simpson with respect to the balancing exercise required by section 138(3) of the Evidence Act.

The ground of appeal is:

- The Court of Appeal erred in denying procedural fairness to the Appellant by overturning a finding made by the trial judge in the Appellant's favour, based on the correctness of the judgment *in the matter of the appeal of Lawrence Charles O'Neill* (unreported, NSWDC 18 August 1988) ("O'Neill"), without the Respondent seeking such an outcome or the Court of Appeal giving notice it was considering it, and therefore without the Appellant having a proper opportunity to make submissions in support of the finding.

On 15 July 2008 the Respondent filed a notice of contention, the ground of which is:

- In the event that this Court finds that the Court of Appeal erred in law by failing to afford the Appellant procedural fairness when it found that the judge deciding *O'Neill* was "mistaken" in his interpretation of section 214 of the Customs Act, then the Respondent gives notice that it will contend that the Court of Appeal's construction of section 214 as set out in [49] - [53] and [109] of its reasons for judgment is correct.

SOK v MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR (M60/2008)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 5 March 2008

Date special leave granted: 21 July 2008

In August 2002 the appellant (Sok) married a woman who is an Australian citizen (the sponsor). In October 2002, Sok applied for both a temporary visa and a permanent visa, as required by the *Migration Regulations* (the Regulations), on the basis of his marriage. In November 2002 he was granted a temporary visa and shortly thereafter he entered Australia on that visa. Although made in 2002, Sok's permanent visa application was not considered until 2005, after at least two years had passed, as allowed for in the Regulations. In March 2005, following an interview and a home visit, a delegate of the Minister refused the visa, not being satisfied that Sok was the spouse of the sponsor. In April 2005 Sok applied to the Migration Review Tribunal (the MRT) for review of that decision.

Through his migration agent, Sok claimed to the MRT that he had been the victim of domestic violence at the hands of the sponsor and provided material in support of his claim as required by the Regulations. As there had been no legal action relating to the alleged domestic violence, Sok's claim was considered a "non-judicially determined claim of domestic violence" under the Regulations. Prior to conducting any hearing, the Member constituting the Tribunal formed the view that she was not satisfied that Sok had suffered the relevant domestic violence under reg 1.23 and referred it to Centrelink for the opinion of an independent expert. The expert's opinion was provided to Sok; after further material in response from Sok, a second referral was made by the Member. Neither opinion supported Sok's claim of domestic violence. A hearing was held in October 2006 where the evidence was mainly about the domestic violence claim. The MRT affirmed the delegate's decision finding that it was required to take as correct an independent expert's opinion on the domestic violence claim and so was not satisfied the claim had been made out.

Sok applied for judicial review. The Federal Magistrates Court allowed the application on the basis that the MRT was obliged by s360 of the *Migration Act* 1958 (Cth) to invite Sok to a hearing before seeking the opinion of an independent expert, but had failed to do so.

The Minister appealed to the Federal Court. During the hearing of the appeal, the Full Court raised the question whether the MRT was bound by Division 1.5 of the Regulations, which includes reg 1.23 and which on its face is addressed only to the Minister. Sok had only raised the claim of domestic violence after the decision of the delegate, and only before the MRT. After receiving submissions on this issue, the Full Court allowed the appeal holding that the regime in Division 1.5 of the Regulations applies only to the original decision maker and does not apply to the MRT in the exercise of its review function. Although it was not necessary in view of its conclusion, the Full Court found that the MRT was not required by s360 of the Act to invite Sok to attend a hearing, before it reached its conclusion that it would seek the opinion of an independent expert.

While the Minister generally supports the appellant's argument that Division 1.5 applies to both the Minister and the MRT in the exercise of its review function, the Minister contends that the Full Court was correct in holding that s360 did not

require that a hearing be held before the MRT could reach a state of non-satisfaction under reg 1.23(1)(b) and then seek the opinion of an independent expert.

The grounds of appeal include:

- The Full Court erred in holding that the regime established by Division 1.5 of the *Migration Regulations* 1994 (Cth) applies only to the Minister as the original decision maker and does not apply to the Migration Review Tribunal in the exercise of its review function.

- The Full Court erred in holding that the Migration Review Tribunal was not required by s360 of the *Migration Act* 1958 (Cth) to invite the appellant to appear before it to give evidence and present arguments about whether he had suffered relevant domestic violence before the Tribunal reached a state of satisfaction for the purpose of para 1.23(1B)(b) of the *Migration Regulations* 1994 (Cth).

LUJANS v YARRABEE COAL COMPANY PTY LTD & ANOR (S3/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 4 December 2007

Date of referral to Full Court: 13 June 2008

The applicant became a quadriplegic when the car she was driving to work at 100 kph along an unsealed private road ran off the road on a right hand bend, turned around and rolled on its side. It was daylight, the weather was fine, and there was no other vehicle, large animal, or large object on the road which could have caused the accident. There was no evidence of any mechanical defect or damage to the tyres. There were no eyewitnesses other than the applicant.

The applicant sued the occupier of the road, her employer, and its road maintenance contractor alleging that the road surface was defective. The trial Judge rejected all but one of her allegations, but found that the appearance of the road was deceptive because a careful driver could not tell where the hard centre section ended and the softer shoulder began. This had caused or contributed to the applicant driving onto the shoulder at the bend and losing control of her vehicle. He held that the respondents had been negligent and awarded substantial damages. The respondents appealed. Their essential submission at trial and on appeal was that the accident was caused by driver error and not by the road.

The Court of Appeal (Ipp & McColl JJA, Handley AJA) unanimously allowed the appeal holding that the applicant had not proved that the respondents were legally responsible for the injuries she suffered when her vehicle ran off the road.

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

- The case directly involves the obligations of an intermediate Court of Appeal exercising its jurisdiction by way of a rehearing.

- The applicant succeeded after a trial which lasted 29 days. The l earned trial judge gave extensive and detailed consideration to a substantial body of oral evidence, photographs, documents and a view of the scene of the accident.

- The Court of Appeal disposed of the appeal in favour of the respondents for reasons which:

    - misstated the evidence of a crucial witness;
    - did not refer except in passing to a substantial body of oral evidence which favoured the applicant's case and which supported critical indings and inferences of the learned trial judge;
    - relied upon assumptions about speeds, distances and reaction time which were not soundly based;
    - relied upon its own interpretation of photographs to arrive at conclusions contrary to those arrived at by the trial judge on the basis of the material referred to above.

THE QUEEN v. KEENAN (B23/2008)

Court appealed from: Court of Appeal, Supreme Court of Queensland

Date of judgment: 11 December 2007

Date special leave granted: 18 June 2008

The respondent, Francis Robert Keenan, and two co-accused, Stephen Booth and Dion Spizzirri, were charged with the attempted murder of Darren Coffey on 8 September 2004, and in the alternative of grievous bodily harm with intent. The respondent was found not guilty of attempted murder but guilty of doing grievous bodily harm and of malicious act with intent and was sentenced to life imprisonment. The jury found Booth not guilty on each count and were unable to reach a verdict on either count against Spizzirri. The prosecution case was that Spizzirri shot Coffey, rendering him a paraplegic, and that both Booth and the respondent were liable under the "common intention" provision of section 8 of the *Criminal Code 1899* (Qld). The common plan alleged by the prosecution was that the co-accused would deliver what was termed "a touch-up" or "beating" of Coffey for having stolen money from the respondent. Booth was armed with a baseball bat and Spizzirri with a loaded gun. There was no evidence that either knew the other was armed in that way, but the position of the respondent in the car suggested that he knew Booth was armed with a bat.

The respondent appealed. The Court of Appeal (McMurdo P, Holmes JA and Atkinson J) unanimously allowed the appeal, set the convictions aside and entered verdicts of acquittal on both offences. The respondent argued successfully that the trial judge should have directed the jury that they could only find the respondent guilty if the prosecution proved beyond reasonable doubt that Coffey's paraplegia, caused by the intentional discharge of a bullet or bullets, was a probable consequence of the common purpose of the respondent and the co-accused to prosecute an unlawful purpose. The Court rejected the prosecution's argument that it was sufficient to prove that they had formed a common intention unlawfully to cause Coffey serious harm and that the intentional doing of the grievous bodily harm to him by one of the co-accused was a probable outcome of the unlawful purpose. The Court held that "offence … of such a nature" in section 8 on the facts referred to the act of intentionally shooting Coffey and so causing him grievous bodily harm, not merely the generic offence of intentionally doing Coffey grievous bodily harm.

The grounds of appeal include:

- The Court of Appeal erred in holding that the Crown in proving guilt pursuant to section 8 of the Criminal Code must establish that the mechanism by which an offence is committed was a probable consequence of the prosecution of the unlawful purpose;

- The Court of Appeal erred in holding that an alternative verdict of grievous bodily harm simpliciter should have been left for consideration by the jury;

- The Court of Appeal erred in failing to order a new trial.

WURRIDJAL & ORS v COMMONWEALTH OF AUSTRALIA & ANOR
(M122/2007)

Date Demurrer referred to Full Court: 11 June 2008

This matter concerns the constitutional validity of certain sections of Part 4 of the *Northern Territory National Emergency Response Act* 2007 (Cth) ("the Emergency Response Act") and items 12, 15 and 18 of Schedule 4 of the *Families, Community Services, and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth) ("the FaCSIA Act").

The first and second plaintiffs are senior members of the Dhukurrdji clan, who are the traditional owners of the Maningrida Land ("the Land") in Arnhem Land in the Northern Territory. They live, together with other members of the Dhukurrdji clan, on the Land, and are entitled, pursuant to s 4(1) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act") to have the title of the Land held for their benefit. The third plaintiff is an Aboriginal and Torres Strait Islander Corporation which conducts a number of businesses, enterprises and activities (including financial and tourism services and a supermarket) on the Land.

The Emergency Response Act came into operation on 17 February 2008. Division 1 of Part 4 of the Act established a regime whereby the Commonwealth acquired a five year lease over certain Aboriginal land, including the Land. The lease confers exclusive possession and quiet enjoyment of the Land on the Commonwealth, subject to several provisos (in ss 34, 37(6) and 52). Section 60 of the Act abrogates the pre-existing guarantee in s 50(2) of the *Northern Territory Self-Government Act* 1978 (Cth) that property acquired in the Northern Territory be acquired on just terms. Section 60(2) provides that if there is an acquisition of property to which s 51(xxxi) of the Commonwealth Constitution applies, and if the acquisition is not on just terms, the Commonwealth is liable to pay a reasonable amount of compensation. The impugned provisions of the FaCSIA Act provide that, contrary to the permit system established by the Land Rights Act, a person may enter and remain on any common area within the Land if such entry is for a purpose that is not unlawful.

The plaintiffs have filed a writ of summons in this Court, seeking a declaration that ss 31, 32, 34, 35, 36, 37, 52, 60, 61 and 62 of the Emergency Response Act and items 12, 15 and 18 of Sch 4 of the FaSCIA Act are invalid. The plaintiffs contend that the impugned provisions effect acquisition of property that is subject to the constitutional guarantee of just terms in s 51(xxxi). They maintain that the provisions for "reasonable compensation" by the Commonwealth are inadequate, both in terms of monetary and non-monetary compensation, to satisfy the requirement of just terms. The first defendant has filed a demurrer contending that the challenged Acts are not relevantly subject to the just terms requirement in s 51(xxxi) of the Constitution, or, in the alternative, the Acts provide for compensation constituting just terms in relation to any acquisition of property.

The Attorney-General for the Northern Territory is intervening as of right and there is an application by two individuals seeking leave to file written submissions as amici curiae.

The issues raised by the statement of claim and demurrer are:

- Does the constitutional guarantee of "just terms" in s 51(xxxi) of the Commonwealth Constitution apply to legislation affecting an acquisition of property from a person enacted by the Commonwealth parliament in reliance upon s122, or upon that section and ss 51(xxxvi) and 51(xxix) of the Constitution?

- If the answer is yes, are ss 31, 32, 34, 35, 36, 37, 52, 60, 61 and 62 of the Emergency Response Act and items 12, 15 and 18 of Sch 4 of the FaSCIA Act invalid because they effect an acquisition of property by the Commonwealth otherwise than on just terms?