SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 29 MARCH 2011

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HASKINS v. THE COMMONWEALTH OF AUSTRALIA (S8/2011)

Writ of Summons: issued 7 January 2011

Special Case: filed 21 February 2011

The Plaintiff enlisted in the Royal Australian Navy on 5 April 2004 and continues to serve in the Navy with the rank of Able Seaman.

On or about 1 October 2007 the Australian Military Court was established pursuant to the *Defence Force Discipline Act* 1982 (Cth) ("the DFDA").

The Plaintiff was charged with eleven charges as to misuse of a Defence Travel Card, contrary to s 60 of the *Financial Management and Accountability Act* 1997 (Cth) and subs 61(3) of the DFDA ("the charges"). He pleaded not guilty to all the charges. On 8 December 2008 the charges were tried by the former Australian Military Court ("the former Court) and the Plaintiff was convicted of all charges and was sentenced to punishment of 35 days detention.

Between 11 December 2008 and 7 January 2009 the Plaintiff was detained at the Defence Force Correctional Establishment at Holsworthy in New South Wales.

On 26 August 2009, in the matter of *Lane v Morrison* this Court declared the provisions of Division 3 of Part VII of the DFDA to be invalid. On 22 September 2009 the *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth) ("the Interim Measures Act") commenced operation. Part 2 of Schedule 1 to the Interim Measures Act applies to the punishments purportedly imposed by the former Court on the Plaintiff prior to the decision in *Lane v Morrison.* Pursuant to items 3, 4, and 5 of Schedule 1 to the Interim Measures Act, the rights and liabilities of the Plaintiff are declared to be and always have been the same as if the punishments purportedly imposed by the former Court had been properly imposed by a General Court Martial.

The rights and liabilities as declared by items 3, 4 and 5 of Schedule 1 to the Interim Measures Act are subject to the outcome of any review provided for by Part 7 of Schedule 1.

The Plaintiff did not lodge a petition for a punishment review with the competent reviewing authority within the time permitted under Part 7 of Schedule 1. The Plaintiff has not sought under Part 7 of Schedule 1 an extension of the period for lodging a petition for punishment review.

The Special Case states the following question for consideration by the Full Court:

- On its proper construction does the *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth) provide lawful authority justifying the detention of the Plaintiff.

- If the answer to question 1 is 'yes', are items 3, 4, and 5 of Schedule 1 to the *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth) valid laws of the Commonwealth?

NICHOLAS v. THE COMMONWEALTH OF AUSTRALIA AND ANOR (S183/2010)

Writ of Summons: issued 19 August 2010

Special Case: filed 30 November 2010

From 1 January 2004 until 25 August 2008 the Plaintiff was a commissioned officer in the Australian Army holding the rank of Captain. On or about 1 October 2007 the Australian Military Court ("the AMC") was established pursuant to the *Defence Force Discipline Act* 1982 (Cth) ("the DFD Act").

Between 18 and 25 August 2008 the Plaintiff was tried before the AMC in respect of eleven charges under the DFD Act. The Plaintiff pleaded not guilty to all eleven charges. On 25 August 2008 the Plaintiff was convicted by the AMC of four offences under the DFD Act.

The AMC purported to impose the following punishments in respect of the four convictions: in respect of the conviction on the first charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, namely obtaining financial advantage contrary to s 135.2(1) of the Commonwealth Criminal Code, the Plaintiff was reduced in rank to Lieutenant with seniority in that rank to date from 1 January 2006 and ordered to pay reparation to the Commonwealth; in respect of the conviction on the second charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, namely obtaining financial advantage contrary to s 135.2(1) of the Commonwealth Criminal Code, the Plaintiff was sentenced to a severe reprimand and ordered to pay reparation to the Commonwealth; in respect of the conviction on the fourth charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, namely conduct tending and intended to pervert the course of justice, the Plaintiff was sentenced to dismissal from the Defence Force effective 19 September 2008; in respect of the conviction on the sixth charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, namely attempting to pervert the course of justice contrary to ss 713.1(1) and 44(1) of the *Criminal Code Act* 2002 (ACT), the Plaintiff was sentenced to dismissal from the Defence Force effective September 2008.

On 25 August 2008 pursuant to the order of the AMC the Plaintiff's rank was reduced to Lieutenant and on 19 September 2008 pursuant to the order of the AMC the Plaintiff was dismissed from the Australian Defence Force.

On 26 August 2009 this Court in *Lane v Morrison* declared the provisions of Division 3 of Part VII of the DFD Act which established the AMC to be invalid. On 22 September 2009 the *Military Justice (Interim Measures) Act (no 2)* 2009 ("the Interim Measures Act") commenced operation. Part 2 of Schedule 1 to the Interim Measures Act applies to the punishments purportedly imposed by the AMC prior to the High Court decision date. Pursuant to item 5 of Schedule 1 to the Interim Measures Act the rights and liabilities of the Plaintiff are declared to be, and always to have been, the same as if the punishments purportedly imposed by the AMC had been properly imposed by a general court martial and certain other conditions were satisfied.

The rights and liabilities as declared by item 5 of Schedule 1 to the Interim Measures Act are subject to the outcome of any review provided for by Part 7 of Schedule 1.

On or about 7 October 2009 the Plaintiff was notified of his right to petition a competent reviewing authority for a punishment review pursuant to Part 7 of Schedule 1 to the Interim Measures Act. The Plaintiff did not lodge a petition for punishment review within the time permitted, nor has the Plaintiff sought an extension of the period for lodging a petition for punishment review.

The Special Case states the following question for consideration by the Full Court:

- Is item 5 of Schedule 1 to the Interim Measures Act a valid law of the Commonwealth Parliament?

ROY MORGAN RESEARCH PTY LTD v COMMISSIONER OF TAXTION & ANOR (M177/2010)

Court appealed from: Full Court, Federal Court of Australia
[2010] FCAFC 52

Date of judgment: 26 May 2010

Date special leave granted: 10 December 2010

Between 1 July 2000 and 30 June 2006 the appellant ("Roy Morgan") conducted market research, gathering some of the information it required by paying people to interview members of the public either face to face or through telephone interviews. It did not treat the interviewers as employees, and did not lodge superannuation guarantee statements in relation to them under the *Superannuation Guarantee (Administration) Act 1992* (Cth) ("the SGA Act"). On 13 September 2007 the first respondent ("the Commissioner") issued superannuation guarantee default assessments in relation to the periods in respect of which he considered Roy Morgan had been required to report. Roy Morgan objected to the assessments. The Commissioner disallowed the objection and the Administrative Appeals Tribunal affirmed the Commissioner's decision.

On appeal to the Full Federal Court (Keane CJ, Sundberg and Kenny JJ), Roy Morgan contended that the SGA Act and the *Superannuation Guarantee Charge Act 1992* (Cth) ("the SGC Act") are constitutionally invalid because the only relevant head of power for legislative imposition of the charge is s 51(ii) of the Constitution which empowers the Commonwealth Parliament to make laws with respect to taxation, and that the charge is not a tax because it is not imposed for public purposes. The court rejected that argument, holding that the exaction effected by s 5 and s 6 of the SGC Act is for public purposes insofar as it provides an incentive to all employers to contribute to the superannuation needs of their employees. The circumstance that the moneys exacted are paid into the Consolidated Revenue Fund in conformity with s 71 of the SGA Act establishes, in the absence of a countervailing consideration, that the exaction effected by s 5 of the SGC Act is for public purposes. The SGA Act and SGC Act do not operate to substitute a new statutory obligation for a pre-existing private obligation in an employer to make a payment to any employee. Rather, the legislation exacts a payment from an employer; and that payment is paid to the Consolidated Revenue Fund. While payments from the Consolidated Revenue Fund pursuant to s 65 of the SGA Act are made by the Commissioner for the ultimate benefit of individual employees, that benefit is only received by an individual employee in the event of infirmity or retirement. The Court held that its conclusion that the exaction imposed by the SGC Act and the SGA Act is for public purposes was supported by the decisions of the High Court in *Australian Tape Manufacturers Association Ltd v The Commonwealth* [1993] 176 CLR 480 and *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* [1993] 176 CLR 555.

The appellant has filed a Notice of a Constitutional Matter.

The grounds of appeal are:

- the Court below erred in holding that the superannuation guarantee charge imposed by the SGC Act and the SGA Act was imposed for public purposes and was valid, and should have held that the charge was not supported by s 51(ii) of the Commonwealth Constitution or any other head of power.

INSIGHT VACATIONS PTY LTD T/AS INSIGHT VACATIONS v YOUNG (S273/2010)

Court appealed from: New South Wales Court of Appeal [2010] NSWCA 137

Date of judgment: 11 June 2010

Date of grant of special leave: 12 November 2010

Mrs Stephanie Young purchased a European package tour from Insight Vacations Pty Ltd ("Insight Vacations") in February 2005. Later that year she was injured when the bus in which she was travelling braked suddenly. (Mrs Young was standing at the time, trying to retrieve something from the overhead locker.) That accident occurred in Slovakia and was apparently the result of a road-rage incident involving the bus driver.

Mrs Young brought proceedings in both contract and tort against Insight Vacations, alleging that it was liable for the bus driver's actions. Insight Vacations however relied upon the exclusion clauses in the contract which it claimed relieved it from liability if Mrs Young was not wearing a seatbelt. It submitted that those clauses were authorised by s 5N of the *Civil Liability Act* 2002 ("the Civil Liability Act"). On 4 June 2009 Judge Rolfe found that s 5N was ineffective and that the exclusion clauses were void due to the operation of s 68 of the *Trade Practices Act* 1974 ("TPA"). His Honour then held that Insight Vacations had breached the warranty of due care and skill implied by s 74(1) of the TPA. By reason of that finding, his Honour did not deal with the alternative claim in tort. Judge Rolfe then awarded Mrs Young $22,371.00 in damages, including $8,000.00 for “disappointment”. His Honour also found that “disappointment” was not a non-economic loss within the meaning of s 16 of the Civil Liability Act.

On appeal to the Court of Appeal, the issues were the constitutional finding and the award of damages for disappointment.

On 11 June 2010 the Court of Appeal (Spigelman CJ, Basten JA & Sackville AJA) allowed Insight Vacation's appeal in part. Their Honours unanimously held that Judge Rolfe's comparison of s 68B of the TPA and s 5N of the Civil Liability Act was misconceived. Justices Basten and Sackville held that s 74(2A) of the TPA picks up a State law that directly restricts or precludes liability for breach of the statutory warranty. It does not pick up a State law that indirectly achieves the same result. They also held that where a State law purports to give effect to a term of a contract modifying the liability implied by s 74(1), the contractual term is rendered void as a result of its inconsistency with s 68 of the TPA. As s 74(2A) applies only to State laws that operate directly, it does not save such a term.

On the issue of damages for disappointment, all Justices held that grief, anxiety, distress and disappointment fall within the statutory definition of non-economic loss in the Civil Liability Act. Their Honours held that Judge Rolfe's distinction between damages for "disappointment" and those for "distress" was unpersuasive.

Insight Vacations has issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

The grounds of appeal include

- The Court of Appeal erred in holding that s 74(2A) of the *Trade Practices Act* 1974 (Cth) picks up and applies only a State law that, by its own terms, limits or precludes liability for breach of the implied statutory warranty in s 74(1) of the *Trade Practices Act* 1974 (Cth).

- The Court of Appeal ought to have held that s 74(2A) of the *Trade Practices Act* 1974 (Cth) picks up and applies a State law that authorises the inclusion of a contractual provision that limits or precludes liability for such a breach.

JEMENA GAS NETWORKS (NSW) LIMITED v MINE SUBSIDENCE BOARD (S312/2010)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 146

Date of judgment: 28 June 2010

Date of grant of special leave: 10 December 2010

The Appellant owns and operates the Moomba to Sydney gas pipeline ("the Pipeline"). That pipeline traverses Mallaty Creek, an area the subject of an underground coal-mining lease. In December 2004 that coal-mining lease encompassed a block of parallel, adjacent panels of coal that had been approved for longwall mining known as Longwalls 29 to 33.

The Appellant did not anticipate that the mining of Longwalls 29 to 31 would cause any subsidence or damage to the Pipeline. It did however anticipate that the mining of coal from Longwall 32 would.

In October 2006 the Appellant commenced work designed to prevent any subsidence-related damage to the Pipeline from the anticipated mining of Longwall 32. In July 2007 it made a claim for compensation pursuant to the *Mine Subsidence Compensation Act* 1961 (NSW) ("the Act") with respect to such. On 23 July 2008 the Respondent rejected that claim. The Appellant then appealed to the Land and Environment Court.

On 30 June 2009 Justice Sheahan rejected the Appellant's claim. This was because the subject works were incurred in anticipation of future subsidence, not with respect to existing subsidence. In doing so, his Honour applied the decision of *Mine Subsidence Board v Wambo Coal Pty Ltd* ("Wambo").

Upon appeal the Appellant submitted that *Wambo* was distinguishable on the basis that some "initial subsidence" had already occurred. In the alternative it submitted that Wambo was wrongly decided.

On 28 June 2010 the New South Wales Court of Appeal (Spigelman CJ, Allsop P, Giles, Basten & Macfarlan JJA) dismissed the Appellant's appeal. Their Honours unanimously held that as *Wambo* could not be regarded as "plainly" or "clearly" wrong, the Court was bound to follow it. Chief Justice Spigelman, President Allsop, Justice Giles and Justice Macfarlan also found that Justice Sheehan had correctly treated the mining of each longwall as a separate course of conduct with respect to the "extraction of coal". The subsidence caused by the mining of Longwall 32 was not therefore a "further subsidence" and *Wambo* could not be distinguished on that basis.

Chief Justice Spigelman, President Allsop and Justice Giles further held that *Wambo* interpreted s 12A(1)(b) of the Act as authorising claims for expenditure that had been incurred to prevent or mitigate damage from subsidence that has already taken place, not that which was anticipated.

The grounds of appeal include:

- The Court of Appeal erred in construing s 12A(1)(b) of the Act so as to limit the right of an improvement owner to compensation for preventative or mitigatory works only to those cases in which the subsidence reasonably anticipated to give rise to the damage has already taken place at the time the expense is incurred or proposed.

- The Court of Appeal erred in addressing the causal connection between subsidence and damage under s 12A(1)(b) of the Act by treating the mining of each longwall of a longwall mining operation as a separate extraction of coal for the purposes of the Act with separate causal consequences.

DASREEF PTY LIMITED v HAWCHAR (S313/2010)

Court appealed from: New South Wales Court of Appeal [2010] NSWCA 154

Date of judgment: 6 July 2010

Date of grant of special leave to appeal: 10 December 2010

From 1999 to 2005 Mr Hawchar worked for Dasreef Pty Ltd ("Dasreef"), a stonemasonry business in Flemington which specialised in sandstone. He had previously worked with sandstone in his native Lebanon and he also did some private stonemasonry work from 2002-2005. In late 2004 Mr Hawchar was diagnosed with scleroderma and his symptoms quickly became disabling. He ceased work for Dasreef and was paid workers' compensation benefits. In May 2006 Mr Hawchar was also diagnosed with silicosis.

In October 2007 Mr Hawchar commenced proceedings in the NSW Dust Diseases Tribunal seeking common law damages on account of his scleroderma and silicosis. (The scleroderma claim was later dismissed at the request of Mr Hawchar's counsel.) With respect to the silicosis claim, Mr Hawchar was successful on liability, with Curtis J awarding him $131,130.43. This amount reflected 20/23 of Mr Hawchar's total exposure to silica dust.

On appeal the issues included:

(i) Whether the primary judge erred in admitting the evidence of Dr Basden (Mr Hawchar's expert) because Dr Basden lacked sufficient relevant expertise.

(ii) Whether the primary judge erred in relying upon his experience as a judge in a specialist tribunal.

(iii) Whether the primary judge erred in drawing an adverse inference from Dasreef's failure to call expert evidence from Mr Rogers, an occupational hygienist.

(iv) Whether the primary judge erred in allocating 20/23 of the silica dust exposure to Dasreef without taking account of any non-negligent exposure.

On 6 July 2010 the Court of Appeal (Allsop P, Basten & Campbell JJA) unanimously held that Dr Basden had sufficient relevant expertise to provide an opinion about the concentration of silica dust in Mr Hawchar's work environment. The inexact nature of that estimate did not make his opinion inadmissible. Its legitimacy was also not undermined simply because it was based on certain assumptions. The Court found that Curtis J did not err in drawing on his experience in a specialist tribunal and that his Honour had correctly approached the matter on the basis that all Mr Hawchar's exposure (to silica dust) at Dasreef was through Dasreef's negligence.

The grounds of appeal include:

- The Court of Appeal erred in holding that the evidence of Dr Basden was admissible pursuant to s 79 of the *Evidence Act* (NSW) as an expert opinion that the concentration of respirable silica in the air in the respondent's breathing zone during the 30-40 minutes the primary Judge found the respondent was cutting stone with an angle grinder exceeded 200mg/m^3.

BOLAND v DILLON (S309/2010)
CUSH v DILLON (S310/2010)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 165

Date of judgment: 15 July 2010

Date of grant of special leave: 10 December 2010

These matters concern a defamatory statement made by Ms Meryl Dillon to the Chair of the Border Rivers/Gwydir Catchment Management Authority ("the CMA"), Mr James Croft, in April 2005. Ms Dillon told Mr Croft that it was common knowledge within the CMA that fellow board members, Ms Amanda Cush and Mr Leslie Boland ("the Appellants"), were having an affair. Ms Dillon became aware of that rumour approximately two months before she mentioned it to Mr Croft.

The Appellants brought defamation proceedings in the District Court of New South Wales against Ms Dillon under the *Defamation Act* 1974. It was common ground during that litigation that:

(a) the Appellants had not had an affair; and
(b) Ms Dillon did not believe that they had had/were having an affair.

Following the "Section 7(A) trial", the jury found that Ms Dillon had defamed the Appellants. On the trial of defences that followed, Judge Elkaim held that the defence of qualified privilege was not available due to her malice. His Honour made that finding without reaching a conclusion on whether the conversation between Ms Dillon and Mr Croft was an occasion of qualified privilege. He then awarded each of the Appellants $5000. Upon appeal, Ms Dillon submitted that Judge Elkaim had erred in failing to find that the conversation between her and Mr Croft was an occasion of qualified privilege.

On 15 July 2010 the Court of Appeal (Allsop ACJ, Tobias JA & Bergin CJ in Eq) unanimously allowed the appeal and ordered a fresh trial on the defence of qualified privilege at common law. Their Honours found that in the circumstances of this case, the existence of the rumour was sufficiently connected to the privileged occasion so as to attract the defence of qualified privilege at common law. Their Honours held that Judge Elkaim had erred in failing to reach that conclusion.

The Court of Appeal also found that Judge Elkaim had erred in reversing the onus of proof (of whether an occasion of qualified privilege existed) and then conflating that analysis with whether Ms Dillon was motivated by an improper motive. Their Honours also held that the prior spreading of the rumour would not of itself be a basis for denying the existence of the occasion of qualified privilege. It would however be relevant to whether Ms Dillon was motivated by an improper purpose. In reaching that conclusion, the Court of Appeal distinguished between Ms Dillon perpetuating something she did not believe to be true with something that she knew to be false.

The Court of Appeal found that a lack of honest belief cannot of itself amount to malice, but it may when combined with other factors. Their Honours however found that there was no reliable evidence that Ms Dillon had in fact spread the rumour (prior to her meeting with Mr Croft). In such circumstances, the only

finding that remained was that Ms Dillon did not believe the rumour to be true. This was not the same as her knowing it to be false. Malice was not therefore made out.

The grounds of appeal (in both matters) are:

- The Court of Appeal failed to have regard to the defamatory imputations found by the jury and erred in holding that the publication of the "rumour" (and not the defamatory imputations) was on an occasion of qualified privilege.
- The Court of Appeal should have found that the statement of the existence of an actual affair, rather than the existence of a rumour of a possible affair, could not have been published on an occasion of qualified privilege.