SHORT PARTICULARS OF CASES

APPEALS

COMMENCING WEDNESDAY, 2 OCTOBER 2013

No.	Name of Matter	Page No
	Wednesday, 2 October 2013	
1.	BCM v. The Queen	1
	Thursday, 3 October 2013	
2.	Daly v. Thiering & Ors	3
	Friday, 4 October 2013	
3.	Expense Reduction Analysts Group Pty Ltd & Ors v. Armstrong Strategic Management and Marketing Pty Limited & Ors	5
	Wednesday, 9 October 2013	
4.	Karpany & Anor v. Dietman	7

****

BCM v. THE QUEEN (B31/2013)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2012] QCA 333

Date of judgment: 4 December 2012

Date of grant of special leave: 6 June 2013

This appeal raises two associated questions - whether the Court of Appeal gave inadequate reasons and failed to make an independent assessment of the whole of the evidence to determine whether the verdicts of guilty on two counts of unlawfully and indecently dealing with a child under the appellant's care were unreasonable.

The appellant was convicted on two counts of unlawfully and indecently dealing with a child (E) who was under 12 years of age and in his care. Each charge nominated, as the time of commission of the offence, "a date unknown between 30 September 2008 and 1 December 2008". The jury could not agree on a verdict in relation to a third count, which was in similar terms. The appellant was imprisoned for 12 months suspended after six months for an operational period of two years.

The appellant appealed. The grounds of appeal were that the verdicts were unsafe and unsatisfactory, and that a miscarriage of justice resulted from the trial Judge's failure to direct the jury that before they could convict the appellant, they needed to be satisfied beyond reasonable doubt that the offences occurred either "within days of the appellant's surprise birthday party" or "within the date span particularized in the indictment".

The Court of Appeal (de Jersey CJ, Muir & White JJA) found that the instructions given by the trial Judge, which included his Honour's express direction to the jury that to convict they must be satisfied beyond reasonable doubt that the respective offences occurred during the period particularized in the charge, were adequate.

In relation to the reasonableness of the verdicts of guilty, the Court noted that counsel for the appellant had submitted that the verdicts of guilty and the jury's inability to agree in respect of count three were "inconsistent and irreconcilable". The Court however found that there was a rational explanation why the jury were unable to reach unanimity on count three notwithstanding the verdicts of guilty on the other counts. That was the fact that the victim had delayed for a further year before raising the allegations involved in the third count with her mother, where on E's account, all three incidents had occurred within the same comparatively short time period. The explanation for that delay was that the victim was scared and that she was embarrassed about responding inappropriately during the incident – which jurors may have accepted as believable, so that although they found her evidence on count three unreliable, that may not have caused them to doubt her credibility overall. In conclusion, the Court held that this was a case where the jury, alive to the competing considerations, were entitled, reasonably to accept the evidence for the prosecution and convict.

The grounds of appeal are:

- The Court of Appeal erred by failing to adequately assess the evidence and give sufficient reasons for the conclusion that the verdicts were not unreasonable or not unsupported by the evidence;

- The Court of Appeal erred by concluding that the verdicts were not unreasonable or not unsupported by the evidence.

DALY v THIERING & ORS (S115/2013)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 25

Date of judgment: 20 February 2013

Special leave granted: 7 June 2013

Mr Alexander Thiering was catastrophically injured while riding his motor bike in October 2007. He suffered spinal cord injuries and is now a quadriplegic, with only limited elbow flexion, shoulder and neck movements possible. Mr John Daly was the driver of the car that collided with him.

Mr Thiering brought proceedings in the Supreme Court against Mr Daly and QBE Insurance Australia Ltd ("QBE") (as the compulsory third party insurer of Mr Daly's car) for damages arising from his injuries. Mr Daly admitted his negligence but he also alleged that Mr Thiering was guilty of contributory negligence. Mrs Rose Thiering is Mr Thiering's mother. She has provided, and continues to provide, attendant care services to Mr Thiering. She is the second plaintiff in those Supreme Court proceedings and she seeks payment from the Lifetime Care and Support Authority of NSW ("LCSA") for the provision of those services.

Mr Thiering is a lifetime participant in a scheme ("the Scheme") administered by the LCSA but established under the *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) ("the LCS Act"). The broad aim of the LCS Act is to provide lifetime care and support for those who have suffered from a traumatic spinal cord injury and/or a severe traumatic brain injury. Before the commencement of the LCS Act, damages in respect of Mr Thiering's treatment and care needs were recoverable under the *Motor Accidents Compensation Act* 1999 (NSW) ("MAC Act"). In order to be eligible for such damages, an injured plaintiff has to establish negligence.

Justice Garling was asked to determine five questions separately and in advance of all other issues in the Supreme Court proceedings. Relevantly, those questions were:

1. Does the LCSA have an obligation under the LCS Act to pay for gratuitous care and assistance provided by Mrs Thiering to Mr Thiering up to the date of judgment?

2. If there is an obligation to pay Mrs Thiering, on what basis should an appropriate hourly rate be determined?

3. Does Mrs Thiering have standing to bring and maintain these proceedings against the LCSA?

4. If so, issues 1 and 2 above also arise for determination in Mrs Thiering's claim against the LCSA.

5. Whether on proper construction of s 130A of the MAC Act, Mr Thiering has any entitlement as against Mr Daly other than damages for non-economic loss and loss of earning capacity?

Justice Garling held, inter alia, that Mr Daly and QBE were liable to Mr Thiering for damages under the MAC Act for the value of the care provided by Mrs Thiering. This was for the period up to the date of the settlement (or judgment) in the proceedings brought by Mr Thiering, but not in the future.

As a result of Justice Garling's decision, the legislation relating to the Scheme was amended by the *Motor Accidents Lifetime Care and Support Schemes Legislation Amendment Act* 2012 (NSW) commencing on 25 June 2012. That Act amended both the LCS Act and the MAC Act, the effect of which was to make it clear that CTP insurers have no liability for damages in respect of the treatment and care needs of participants in the Scheme, including care provided on a "gratuitous basis".

On 20 February 2013 the Court of Appeal (McColl, Macfarlan & Hoeben JJA) held that s 130A of the MAC Act did not preclude damages being paid by a third party for past attendant care services where the Scheme has not paid and is not liable to pay, for those services.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in its construction of s 130A of the MAC Act.

- The New South Wales Court of Appeal erred in its construction of s 6(1) of the LCS Act.

EXPENSE REDUCTION ANALYSTS GROUP PTY LTD & ORS v ARMSTRONG STRATEGIC MANAGEMENT AND MARKETING PTY LIMITED & ORS (S118/2013)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 430

Date of judgment: 18 December 2012

Special leave granted: 7 June 2013

This matter concerns the mistaken provision of certain documents ("the Disputed Documents") during the discovery process in Supreme Court proceedings.

The Respondents' solicitors are Marque Lawyers ("Marque") and the solicitors for the Appellants are Norton Rose Australia ("Norton Rose"). Prior to verifying any lists of documents in the Supreme Court proceedings, Norton Rose gave Marque a CD of images of documents provided by some of the Appellants. Those documents had been reviewed by Norton Rose and released as not being subject to a privilege claim. Among them were the Disputed Documents. In October 2011 Norton Rose served verified lists of documents and further CDs of document images (which again included the Disputed Documents) on Marque. The Disputed Documents were all listed among documents over which there was no claim of privilege. Many of them however were also listed in sections of privileged documents or redacted documents.

Subsequent correspondence from Marque to Norton Rose mentioned that several of the discovered documents related to the obtaining of legal advice by some of the Appellants. Norton Rose then asserted that those documents were privileged and that they had been disclosed inadvertently. Norton Rose requested Marque to return the documents and undertake not to rely on them. Marque refused to do so, contending that any privilege had been waived. The Appellants then applied for orders that certain discovered documents (later refined to the Disputed Documents) be returned to them and not be further used in the proceedings.

On 26 April 2012 Justice Bergin granted the orders sought, except in relation to four documents ("the Released Documents"). Her Honour inferred that the Appellants had intended to claim privilege over those documents which had been included in duplicate in the privileged or redacted sections of the verified lists of documents. Those documents had therefore been inadvertently included in the non-privileged sections of the Appellants' lists and produced to the Respondents. Justice Bergin held that privilege over the Released Documents had been waived, as no evidence indicated that the Appellants had intended to claim privilege over those documents after Norton Rose had reviewed them.

On 18 December 2012 the Court of Appeal (Campbell & Macfarlan JJA, Sackville AJA) unanimously allowed the Respondents' appeal. Their Honours held that neither client legal privilege under the *Evidence Act* 1995 (NSW) nor legal professional privilege at common law could support the injunctions made. Such injunctions could however be supported by the law of confidential information. The Court of Appeal then found that the circumstances in which the Respondents obtained the Disputed Documents did not give rise to the necessary obligation of conscience on them. This was because Norton Rose's disclosure of those

documents was not a mistake that would have been obvious to the relevant solicitor at Marque.

The grounds of appeal include:

- The Court of Appeal erred in finding that the only principled basis for the grant of the orders sought by the Appellants before the primary judge lay in the law of confidential information.

- The Court of Appeal ought to have found that where there has been an error made in compliance with the Court's orders, processes and/or procedures (such as in giving discovery), the Court has all necessary power to make such orders as may be necessary so as to remedy any injustice that may be occasioned by allowing that error to stand.

On 26 June 2013 the Respondents filed a notice of cross appeal, the grounds of which include:

- The Court of Appeal erred in refusing the Respondents leave to appeal from the finding of the trial judge that a decision was made to claim privilege over the Documents.
-

KARPANY & ANOR v DIETMAN (A18/2012)

Court appealed from: Full Court, Supreme Court of South Australia [2012] SASCFC 53

Date of judgment: 11 May 2012

Date special leave referred: 7 September 2012

The applicants, father and son, were charged with being in joint possession or control of 24 undersized Greenlip abalone, contrary to s 72(2)(c) of the *Fisheries Management Act* 2007 *(*SA) ("the FM Act"). When the matter came before the Magistrate, it was accepted by the applicants that, if s 72(2)(c) was operative, the commission of the offences was proved. However, the applicants asserted that they were entitled to take the undersized abalone. The prosecution accepted that both applicants were members of an Aboriginal group ("the Narrunga People") whose customary native title rights included fishing in the waters where the abalone were taken. The applicants submitted that the Minister's power to exempt a person from specified provisions of the FM Act had the result that the South Australian regime regarding the taking of abalone was one of prohibition subject to obtaining a licence or permit within the meaning of s 211 of the *Native Title Act* 1993 (Cth) ("the NT Act"). Consequently s 72(2)(c) was inoperative because of the terms of s 211 of the NT Act. The Magistrate accepted the applicants' argument and dismissed the charges.

The respondent's appeal to the Full Court of the Supreme Court (Gray, Kelly and Blue JJ) was upheld. There were two grounds of appeal: first, the applicants were not exercising native title rights because they had been extinguished in 1971 by s 29(2) of the *Fisheries Act* 1971 (SA) ("the 1971 Act"); and, secondly, that the Magistrate erred in holding that s 72(2)(c) of the FM Act relevantly prohibited persons from fishing "*other than in accordance with a licence, permit or other instrument granted or issued to them under the law*" within the meaning of s 211(1)(b) of the NT Act.

On the first ground of appeal, the majority of the Court (Gray and Kelly JJ, Blue J dissenting on this ground) found that the applicants' native title rights had been extinguished. The majority held that native title will be extinguished where the native title right or interest is inconsistent with a right conferred by statute: this calls for a comparison of the legal nature and incidents of the native title right and interest with that of the statutory right. In this case the relevant native title right was the applicants' right to access and take fish. The substantive effect of the 1971 Act was to place all persons, including Aboriginal persons, under the regime of the statute and to treat all persons as subject to the rights and obligations set out in the statute. As a consequence, the native title right to fish was extinguished and replaced by a statutory right available to all persons in the State, namely the right to fish and take fish not for sale, subject to limitations contained in the Act, including limitations as to size. Blue J was of the view that the s 29(2) of the 1971 Act was merely regulatory and not a statutory prohibition inconsistent with native title, so that the native title rights were not extinguished.

On the second ground, the Court noted that s 115 of the FM Act gives to the Minister a general power to exempt a person or class of persons from specified provisions of the Act, including s 72(2)(c). However, the Court found there were

marked contrasts between a fishing licence, fishing permit or boat registration under Part 6 and an exemption under s 115. Whereas licences, permits and boat registrations regulated commercial fishing activities, s 72(2)(c) prohibited certain activities, subject only to the power of the Minister to grant an exemption under s 115. The mere existence of that reserve power does not convert a prohibition regime into a mere licensing regime. Thus the Court unanimously held that the Magistrate was in error in concluding that s 211 of the NT Act applied to s 72(2)(c) of the FM Act to make the State law inoperative.

On 7 September 2012 the application for special leave was referred to an expanded bench to be argued as on appeal. A Notice of Constitutional Matter has been served and the Attorney-General for South Australia and the Commonwealth will be intervening. The South Australia Native Title Services Limited is also seeking leave to intervene in support of the applicants.

This matter had previously been listed for hearing before an expanded bench in February 2013, however that hearing date had been vacated. Subsequently, because argument in this matter would be affected by the outcome of this Court's decision in *Akiba v Commonwealth of Australia & Ors,* this matter was not relisted until after judgment in the *Akiba* matter was delivered.

The questions of law said to justify a grant of special leave are:

- Whether the native title rights and interests to fish of the Narrunga People, including the applicants, had been extinguished by virtue of s 29 of the *Fisheries Act* 1971 (SA);

- Whether s 72(2)(c) of the *Fisheries Management Act* 2007 *(*SA) is not operative by virtue of s 211 of the *Native Title Act* 1993 (Cth).