SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER 2009

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AMACA PTY LTD v. ELLIS as Executor of the estate of Paul Steven Cotton (dec) & ORS (P13/2009)
STATE OF SOUTH AUSTRALIA v. ELLIS as Executor of the estate of Paul Steven Cotton (dec) & ORS (P14/2009)
MILLENIUM INORGANIC CHEMICALS LTD v. ELLIS as executor of the Estate of Paul Steven Cotton (dec) & ORS (P12/2009)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2008] WASCA 200

Date of judgment: 26 September 2008

Date of grant of special leave: 1 May 2009

The deceased was employed by the Engineering and Water Supply Department of South Australia (EWSD) from September 1975 until October 1978, laying and repairing concrete pipes supplied by Amaca Pty Ltd ("Amaca") which contained asbestos. He was also employed for periods between April 1990 and January 2002 by Millenium Inorganic Chemicals Ltd ("Millenium") and was exposed to asbestos in the course of this employment. The deceased was a cigarette smoker from about 1973 (at age 17) until his death from lung cancer in January 2002, smoking not less than 15 cigarettes per day. Before his death, the deceased brought actions (continued after his death by his executor, Teresa Ellis) alleging that EWSD was liable in negligence and contract for failing to provide a safe system of work, that Millenium was liable in negligence, breach of statutory duty and breach of contract for failing to take precautions to reduce exposure to asbestos dust, and that Amaca was liable in negligence for failing to warn EWSD of the risks associated with cutting the concrete pipes and failing to recommend special work procedures. The trial judge (E.M. Heenan J) found for the first respondent against EWSD and Millenium on the contractual claims, and against Amaca on the negligence claim but reduced the damages awarded against Amaca by 10% by reason of the deceased's contributory negligence.

On appeal, a majority of the Court of Appeal (Steytler P and McLure JA; Martin CJ dissenting) dismissed the appeals by South Australia, Amaca and Millenium, but allowed Amaca's appeal in respect of contributory negligence, and substituted an apportionment of 50% for that of the trial judge. The majority concluded that the epidemiological evidence supported a finding that tobacco smoke and asbestos operate cumulatively and have a "biologically inter-dependent effect" and that the defendant parties (South Australia, Amaca and Millenium) were liable for damage suffered as a result of the deceased's cancer notwithstanding that the deceased would have suffered lung cancer irrespective of the consequences of the breaches of duty which resulted in asbestos exposure. Martin CJ would have dismissed the appeal on the basis that the first respondent failed to establish that the breaches of duty established against the defendant parties caused or materially contributed to the deceased's lung cancer. However, Martin CJ agreed that if he was wrong, the damages awarded against Amaca should be reduced to reflect the contribution made by the deceased's failure to take responsible care to protect his own health.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in finding that any act or omission of each of the respondents caused or materially contributed to the deceased developing lung cancer.

- Can a plaintiff prove causation by proving that an act or omission of the defendant increased the risk of damage, without also proving that the act or omission caused or materially contributed to the damage?

ZHENG v CAI (S67/2009)

Court appealed from:	New South Wales Court of Appeal [2009] NSWCA 13
Date of judgment:	25 February 2009
Date of referral into an enlarged bench:	4 September 2009

On 11 May 2000 the Applicant was injured in a car accident on her way to work. The Respondent was the driver of the car in which the Applicant was travelling and he admitted breach of duty of care.

The Applicant commenced District Court proceedings, seeking damages under the *Motor Accidents Compensation Act* 1999. At the time of the accident she was working as a seamstress and was paid $380 net per week. Her injuries meant that she could not return to work. In July 2001 the Applicant moved to Singapore to study theology and she returned to Sydney in June 2005. The Applicant initially lived with members of her church before then moving into a unit paid for by the church. She also relied on members of the church to assist her with her housework. In addition, the church made weekly payments to the Applicant which supposedly allowed her to function more effectively as a volunteer worker.

The Applicant unsuccessfully attempted to find paid work while also spending approximately 20 hours per week involved in church activities. At the hearing before Judge Garling, the Respondent submitted that the Applicant was in fact employed by the church. Judge Garling rejected that submission and awarded the Applicant $300,681 in damages.

On 25 February 2009 the Court of Appeal (Giles & Basten JJA, Hoeben J) unanimously allowed the Respondent's appeal and reduced the Applicant's damages to $17,478. Their Honours accepted the Respondent's submission that Judge Garling had wrongly characterised the payments made to the Applicant by the church. They found that those payments should have been taken into account in assessing economic loss. This is because they were analogous to providing payment for a service. The Court of Appeal also found that they would not have been made if the Applicant had been in paid employment. As such the payments constituted a form of compensation for her inability to obtain employment.

On 4 September 2009 Justices Gummow and Bell referred this matter into an expanded bench for further hearing.

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

- Under what circumstances should benevolent payments made by a charity be taken into account when assessing damages for personal injuries caused by a third party?

MINISTER FOR IMMIGRATION & CITIZENSHIP v SZMDS & ANOR
(S193/2009)

Court appealed from: Federal Court of Australia
[2009] FCA 210

Date of judgment: 10 March 2009

Date of grant of special leave: 18 August 2009

The First Respondent is a Pakistani citizen who arrived in Australia on 3 July 2007. Shortly afterwards he applied for a protection visa, claiming to fear persecution in Pakistan on the basis of being gay. On 8 November 2007 the Appellant's delegate refused that application, as did the Refugee Review Tribunal ("RRT") on 18 February 2008. It rejected the First Respondent's claim of being gay, holding that if he genuinely feared persecution in Pakistan he would not have travelled there from the United Arab Emirates ("UAE") in 2007. The RRT also noted that the First Respondent had travelled to the United Kingdom in 2006 but had not sought protection there. It further rejected his claim to have engaged in gay "activities" in Australia.

On 8 July 2009 Magistrate Scarlett dismissed the Appellant's application for judicial review to the Federal Magistrates' Court. His Honour was satisfied that the RRT had complied with its obligations under sections 424, 424A and 425 of the *Migration Act* 1958. Its decision therefore was free of jurisdictional error.

On 10 March 2009 Justice Moore allowed the First Respondent's appeal. His Honour found that the RRT had committed jurisdictional error because two of its key findings were illogical. In particular, he questioned the logicality of the conclusion that the First Respondent's brief return to Pakistan in 2007 undermined his account of having engaged in gay sex in the UAE. His Honour found that the First Respondent's return to Pakistan would have only undermined his claims if there was a basis for believing that his family (or others) might learn of his sexuality. Only he knew that information, and the RRT otherwise made no finding about how it might have become public. Consequently it was unclear how the First Respondent's brief return to Pakistan undermined his claim of having been sexually active in the UAE. There was no basis therefore for the RRT concluding that it was inconsistent with him fearing persecution based on his sexuality.

His Honour also found that the RRT's treatment of the First Respondent's failure to claim asylum in the United Kingdom was illogical. In essence, the First Respondent claimed that he did not seek asylum in the United Kingdom because he could return to the UAE where he had both a good life and a relationship. His circumstances only changed after he returned to the UAE from the United Kingdom and his relationship broke down. The RRT's conclusion that the First Respondent was not gay was therefore based on an illogical reasoning process.

The grounds of appeal include:

- Contrary to the Federal Court of Australia's findings at [27] - [30], there was no illogicality or irrationality in the Second Respondent's findings that the First Respondent's failure to claim asylum in the UK undermined his claim to fear being perceived as, or found to be, a homosexual, if he returned to Pakistan.

- Contrary to what was found or assumed by the Federal Court of Australia, none of the findings of fact (of the Second Respondent) impugned by the Court were findings of jurisdictional fact.

HENLEY ARCH PTY LTD v KOVACIC (M86/2009)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2009] VSCA 56

Date of judgment: 27 March 2009

Date special leave granted: 4 September 2009

The respondent was a bricklayer who alleged that he was injured on 25 November 2003 whilst lifting a heavy steel lintel on a building site. He was working as part of a team laying bricks for the appellant. There was no written contract between the parties. The appellant provided the respondent and his team with a plan for a house and the price to be paid to them for the work was calculated by reference to the number of bricks that were to be laid.

The respondent applied to the County Court of Victoria pursuant to the *Accident Compensation Act* 1985 (Vic) ("the Act") for leave to commence proceedings to recover damages for the injury. In order to do so, he had to establish the he was a "worker" under the Act. He contended, inter alia, that he was deemed by s 8 of the Act to be a worker. Section 8(1) relevantly provided: "*Where any person . . . in the course of and for the purposes of a trade or business carried on by the person enters into a contract with any natural person . . . (a) under or by which the contractor agrees to perform any work not being work incidental to a trade or business regularly carried on by the contractor in the name of the contractor or under a firm or business name . . . then for the purposes of the Act the contractor shall be deemed to be working under a contract of service with an employer . . .*". Judge Morrow found that the respondent was a worker within that definition (rather than a worker in the primary sense). However he was not satisfied that the incident described by the respondent had in fact occurred. Accordingly, the application was refused.

The respondent appealed to the Court of Appeal (Warren CJ, Buchanan and Ashley JJA) which allowed his appeal. The appellant had filed a notice of contention. Ashley JA (with whom Warren CJ and Buchanan JA concurred) noted that the question of whether the respondent regularly carried on a trade as a bricklaying contractor was not agitated on trial, but that on balance he did so. His Honour observed that in approaching s 8, the focus had to be on the particular contract under which work was being performed at the time of the injury. On the evidence the Court held that the moving of a large lintel was not incidental to the trade of bricklaying. His Honour further found that the trial judge's conclusion, that the lifting incident did not occur, was flawed by inconsistent credibility findings and was accordingly unsafe. The matter was remitted for fresh consideration to the County Court.

The appellant seeks to argue that there was no finding by the Court of Appeal that it was part of the respondent's contractual obligations to lift and install the lintel and that absent such a finding, the appeal ought to have been dismissed. The respondent submits that the proceedings in the courts below were conducted on the assumption that it was part of the respondent's contractual obligations and that the Court of Appeal dealt fully with all of the issues raised before it.

The ground of appeal is:

- The Victorian Court of Appeal erred by holding that the respondent was deemed under s 8 of the Act to be working under a contract of service for the appellant without the Court of Appeal finding any provision of any contract with the appellant to perform the work alleged to have caused his injury.

TABET (BY HER TUTOR GHASSAN SHEIBAN) v GETT (S259/2009)

Court appealed from: New South Wales Court of Appeal
[2009] NSWCA 76

Date of judgment: 9 April 2009

Date of grant of special leave: 4 September 2009

This appeal raises the question of whether damages can be sought by a plaintiff in a medical negligence claim for loss of a chance of a better medical outcome and whether the Court of Appeal was correct in declining to follow, inter alia, its own previous decision in *Rufo v Hosking* [2004] NSWCA 391.

The appellant/plaintiff was a 6 year old girl who was first admitted to hospital on 29 December 1990 complaining of headaches and vomiting. After re-admission on 13 January 1991 a provisional diagnosis of meningitis was made and a lumbar puncture scheduled. A CT scan was performed on 14 January after a seizure which revealed a medulo blastoma. Immediate surgery and subsequent chemotherapy was successful, but left the appellant severely disabled.

Studdert J held that the failure to arrange a CT scan on 13 January was not proved to be causative of harm given the existing condition, but that the plaintiff had proved an entitlement to damages for loss of a chance of a better outcome and avoidance of the damage done on 14 January.

The Court of Appeal (Allsop P, Beazley and Basten JJA) granted leave to the appellant to re-argue the question of whether the authorities in Australia for awarding damages for loss of a chance of a better medical outcome were correct and concluded that cases such as *Rufo* above and *Gavalas v Singh* [2001] VSCA 23, were plainly wrong and should not be followed. Dr Gett's appeal was allowed with costs.

The grounds of appeal are:

- The Court of Appeal erred in holding that the causal effects of clinical negligence should be assessed on the balance of probabilities alone, not on the basis of loss of a chance of a better outcome.

- The Court of Appeal erred in holding that:

  (a) The learned trial judge misapplied the loss of a chance analysis in coming to the conclusion that there was a 40 per cent loss of a chance of a better outcome of avoiding the damage referable to the deterioration on 14 January 1991 (the damage referable to deterioration on that date being found, without ultimate challenge on appeal, to be 25 per cent of entire damage suffered by the applicant); and

(b) On the evidence the relevant lost chance, if a valid approach, was no greater than 15 per cent,

because the Court of Appeal: erred in its statement and interpretation of the effect of the evidence as to the treatment or treatments that would have been provided to the plaintiff if the negligence had not occurred; and, erred in holding that one must, in assessing the chance lost, exclude those matters which increased the chance of a better outcome but which were not proven on the balance of probabilities as the most likely treatment.