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<u>MAURICE BLACKBURN CASHMAN v BROWN</u> (M176/2010)

<u>Court appealed from</u>: Court of Appeal of the Supreme Court of Victoria [2010] VSCA 206

<u>Date of judgment</u>: 25 August 2010

<u>Date special leave granted</u>: 10 December 2010

The respondent was employed by the appellant as a salaried partner its legal practice in Melbourne. She claims that between 8 January 2003 and 17 November 2003 she was 'systematically undermined, harassed and humiliated' by a fellow employee, as a result of which she suffered injuries, including severe anxiety and depression, eczema, headaches and agoraphobia.

On 24 March 2006 WorkCover referred the respondent for opinion of a medical panel set up under the *Accident Compensation Act 1985* (Vic) ('the Act'). The panel was asked, inter alia, to determine the degree of impairment suffered by the respondent. Its determination was as follows: '[T]here is a 30 per cent psychiatric impairment resulting from the accepted psychological injury when assessed in accordance with s 91(2) for the purposes of ss 98C, and 134AB(3) and (15) of the Act. The degree of psychiatric impairment is permanent ...'

Because the degree of impairment of the respondent had been assessed by the medical panel to be 30 per cent, her injury was deemed to be a serious injury within s 134AB(15) of the Act. This entitled the respondent to commence a common law proceeding. In its defence to the proceeding, the appellant denied that the respondent had suffered injury. In her reply, the respondent claimed that the appellant was estopped, or precluded from going behind the opinion of the medical panel. Prior to the trial in the County Court of Victoria, Judge Lacava referred a special case to the Court of Appeal. The special case raised the question as to the consequences, in a proceeding at common law for damages, of it being deemed, pursuant to s 134AB(15) of the Act, that the respondent suffered from a serious injury.

The Court of Appeal (Ashley and Mandie JJA, and Ross AJA) held that the appellant was prohibited in the proceeding from making any assertion and leading or eliciting any evidence which was inconsistent with the opinion of the medical panel. The Court relied on s 68(4) of the Act, which states: "For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person ...".

The grounds of appeal include:

- The Court of Appeal erred in holding that, by the combination of s 68(4) and s 134AB(15) of the *Accident Compensation Act* 1985, the opinion formed on 28 June 2006 by a medical panel (constituted by two medical practitioners) that the respondent's degree of psychiatric impairment was 30% has the result that, for the purposes of the trial of the respondent's common law damages claim -

(a) the respondent will be deemed to suffer from "serious injury" both as to pain and suffering and loss of earning capacity consequences;

(b) the opinion of the medical panel, with "its mandated serious injury consequences", must be adopted and applied in the common law damages trial; and

(c) the appellant is not entitled to put in issue that fact that, at the time the opinion was expressed, the respondent suffered serious injury, namely a permanent severe mental disturbance or disorder.

AMERICAN EXPRESS WHOLESALE CURRENCY SERVICES PTY LTD v. COMMISSIONER OF TAXATION (S238/2010) AMERICAN EXPRESS INTERNATIONAL INC v. COMMISSIONER OF TAXATION (S239/2010)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 122

Date of judgment: 17 September 2010

Date of referral to the Full Court: 11 February 2011

The proceedings in the Federal Court were commenced in February 2007 as appeals under Part IVC of the *Taxation Administration Act* 1953 against the disallowance of objections to assessments of net amounts of GST payable by the applicants.

The proceedings involve the determination of an entitlement to input tax credits under the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ('the GST Act'). Specifically, they concern the treatment of payments to American Express International Inc by the holders of charge cards and credit cards following the cardholders' defaults.

The applicants are related companies whose position is relevantly the same in relation to the principal question of entitlement to input tax credits. Their position is that they are entitled to an input tax credit for a proportion of the goods and services tax ('GST') said to be embedded in the creditable acquisitions that they have made. Their dispute with the Commissioner of Taxation concerns the proper calculation of the "extent of creditable purpose" under s 11-30(3) of the GST Act – that is, the calculation to be applied in determining the entitlement to input tax credits with respect to certain acquisitions.

Under the GST Act, taxpayers are entitled to input tax credits on "creditable acquisitions", and an acquisition can be fully creditable, partly creditable, or not creditable, depending, among other things, on the purpose for which the taxpayer makes the acquisition. In order to have an input tax credit, the taxpayer must have a "creditable purpose" as defined.

On 19 June 2009 Emmett J upheld the appeals against the Taxation Commissioner's disallowance, set aside the Commissioner's objection decisions and remitted the matters to the Commissioner. The Commissioner appealed these decisions. When the appeals were called on for argument before the Full Federal Court (Dowsett, Kenny and Middleton JJ) on 26 November 2009 counsel for the Commissioner moved for leave to amend both notices of appeal. By majority (Kenny and Middleton JJ) the Full Court allowed the appeals and allowed leave to amend the notices of appeal.

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

- Is the contract between the first applicant (Amex) and each of its cardholders whereby the cardholder has the "right to present the card as payment for goods and services "the supply" of anything that is recognized in law or in equity as property in any form?

- Did the majority err in permitting the respondent to amend its grounds of appeal?

LITHGOW CITY COUNCIL v JACKSON (S66/2011)

Court appealed from: New South Wales Court of Appeal [2010] NSWCA 136

Date of judgment: 11 June 2010

Date of grant of special leave: 11 February 2011

The respondent was found unconscious with a serious head injury in a concrete drain in a park occupied by the appellant, having taken his dogs for a walk in the early hours of the morning whilst intoxicated. He had no memory of the events in question and there were no witnesses to the accident. He commenced proceedings against the appellant in negligence alleging that he had fallen over a low, unfenced retaining wall of the drain. At first instance, the respondent was unsuccessful with Ainslie-Wallace DCJ finding that he did not discharge his onus of proving how he fell and came to be injured. The Court of Appeal allowed an appeal against that decision. Allsop P found that on the available evidence, an inference could be drawn that the respondent fell over the wall whilst walking down the hill in the dark. Of particular importance was a record made by ambulance officers who attended the scene. The officers filled out a document referred to as a "retrieval record", a document admitted without objection. The retrieval record as extracted before the Court of Appeal relevantly stated "Fall from 1.5 metres onto concrete". Allsop P admitted the statement in the record pursuant to s 78 of the *Evidence Act* 1995 (NSW) finding that it constituted some evidence that the respondent fell from the wall and could be taken as some evidence of a position of the body consistent with a view to that effect. The respondent's injuries appeared somewhat more likely to have occurred from a serious fall rather than from stumbling from the side of the drain as the appellant contended.

When the appellant sought special leave to appeal to this Court, it became apparent that the retrieval record had not been accurately reproduced before the Court of Appeal in that a question mark preceded the statement "Fall from 1.5 metres onto concrete".

On 31 July 2009, a Court constituted by Gummow, Hayne and Heydon JJ granted special leave to appeal, treated the appeal as instituted, heard instanter and allowed. It set aside the orders of the Court of Appeal and remitted the matter to that Court for further hearing. This was done on the basis of the incomplete reproduction of the retrieval record referred to above.

The Court of Appeal was composed of the same Bench which heard the first appeal (Allsop P, Basten JA and Grove J). Again, the appellant's appeal was dismissed. Allsop P again found that the ambulance record was admissible and when added to the totality of the evidence, made it more likely than not that the respondent had fallen from the wall in the manner described in the first Court of Appeal decision. Grove J agreed with the orders proposed by the Allsop P for the reasons which the President had given. Basten JA delivered a separate judgment also finding that the evidence should have been admitted.

The grounds of appeal include:

- The Court of Appeal ought to have held that because the only inference open to be drawn from the ambulance records was that the authors questioned whether the respondent had fallen 1.5 metres onto concrete, the matter contained in the patient history was not an opinion.

The respondent seeks leave to file a notice of contention out of time. The respondent contends that the decision of the Court of Appeal should be affirmed on the ground that the judgment of the Court as to the circumstances of injury and the resultant findings on liability is supported by evidence other than that challenged.

PHONOGRAPHIC PERFORMACE COMPANY OF AUSTRALIA LIMITED & ORS v COMMONWEALTH OF AUSTRALIA & ORS (S23/2010)

Second amended writ of summons: 27 January 2011
(original filed 17 February 2010)

Date of special case: 3 February 2011

The Phonographic Performance Company of Australia Limited ("PPCA") represents many owners and controllers of sound recordings. It does this by granting licences which authorise the broadcasting of sound recordings in which copyright subsists. The CRA (formerly known as the Federation of Australian Radio Broadcasters) is the industry representative for commercial radio broadcasters. It negotiates industry licence agreements for its members' benefit.

EMI Music Australia Pty Limited, Sony Music Entertainment (Australia) Pty Limited, Universal Music Australia Pty Limited, Warner Music Australia Pty Limited and J Albert & Son Pty Limited all make and license sound recordings in Australia.

Over the past century or so, developments in the law of copyright have followed the advances in technology. Differences have emerged however between the copyright protection afforded by the British legislation (as adopted by Australia) and that which has been adopted by the United States. Legislative reform in Australia resulted in the *Copyright Act* 1968 (*Cth)* ("the Act") being passed.

Over the years, both public broadcasters (such as the Australian Broadcasting Corporation) and commercial broadcasters have been required to compensate the various record manufacturers (pursuant to a variety of different formulas) for the use of sound recordings in which they either owned or controlled the copyright. Under the current formula, head agreements have been struck between the PPCA and the CRA whereby the PPCA enters into individual licence agreements (known as member licences) with each individual broadcaster. The PPCA then grants a licence to that broadcaster to broadcast sound recordings controlled by its licensors. The aggregate of the licence fees payable to PPCA is expressed as a percentage of the gross revenue of CRA members, currently 0.4%. The ABC however pays 0.5 cents per head of population, an amount unchanged since 1968.

Various sections of the Act still grant the Copyright Tribunal power to determine the remuneration for the use of material in which copyright subsists.

On 20 January 2011 Justice Gummow referred the questions of law set out in the special case into the Full Court for consideration.

The questions stated for the opinion of the Full Court are as follows:

1) Are some or all of the provisions in ss 109 and 152 of the Act beyond the legislative competence of Parliament by reason of s 51(xxxi) of the Constitution?

2) If so, should some or all of these provisions be read down or severed and, if so, how?

3) What order should be made in relation to the costs of the special case?