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REEVES v THE QUEEN (S44/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCA 34

Date of judgment: 21 February 2013

Referred to a full bench: 7 June 2013

Mr Graeme Reeves ("the Applicant") was convicted and sentenced for the following offences:

i) obtaining a financial advantage by deception;
ii) maliciously inflicting grievous bodily harm with intent; and
iii) two offences of aggravated indecent assault.

These offences occurred between December 2001 and July 2003 when the Applicant was employed as an obstetrician and gynecologist at the Bega and Pambula District Hospitals. The trial judge, Judge Woods, sentenced the Applicant to 3½ years imprisonment, with a non-parole period of 2 years. The Applicant then sought leave to appeal against both his conviction for the grievous bodily harm with intent count and the aggravated indecent assault counts. For its part, the Crown appealed against the manifest inadequacy of the sentences imposed.

On 21 February 2013 the New South Wales Court of Criminal Appeal (Bathurst CJ, Hall & Hulme JJ) upheld the Applicant's appeal in part. This was in respect to one of the counts of aggravated indecent assault. Their Honours also found that Judge Woods had erred in directing the jury concerning the issue of consent (to the operation), being the subject matter of the maliciously inflicting grievous bodily harm count. The Court of Criminal Appeal nevertheless applied the proviso in s 6(1) of the *Criminal Appeal Act* 1912 (NSW) and dismissed the Applicant's appeal. Their Honours held that no substantial miscarriage of justice had occurred, nor had the Applicant lost a reasonable chance of acquittal. They further held that Judge Woods' error was not so fundamental that the proviso could not be used.

The Court of Criminal Appeal also upheld the Crown's appeal on sentence. Their Honours found that the effective sentence imposed on the Applicant was manifestly inadequate. They held that Judge Woods had given excessive weight to the Applicant's chronic depressive condition. This was particularly so in relation to the obtaining a benefit by deception count and that of maliciously inflicting grievous bodily harm with intent. On the aggravated indecent assault count however, the Court of Criminal Appeal did not consider that the sentence imposed by Judge Woods to be manifestly inadequate. Their Honours then went on to resentence the Applicant to 5½ years imprisonment, with a non-parole period of 3½ years.

On 7 June 2013 Chief Justice French and Justice Kiefel referred this matter into the Full Court so that it may be argued as if it was on appeal. The questions of law said to justify the grant of special leave to appeal include:

- In what circumstances, if any, can a surgeon who performs an operation believing it to be necessary for the patient's wellbeing be guilty of a crime requiring proof of malice or specific intent to inflict grievous bodily harm?

- Does the civil law concept of "informed consent" have any role in such a case?

KLINE v. OFFICIAL SECRETARY TO THE GOVERNOR GENERAL AND ANOR (B47/2013)

Court appealed from:	Full Court of the Federal Court of Australia [2012] FCAFC 184
Date of judgment:	19 December 2012
Date of grant of special leave:	16 August 2013

The appellant made two unsuccessful nominations of a person for appointment to the Order of Australia. She sent a request to the first respondent pursuant to the *Freedom of Information Act* 1992 (Cth) ("the FOI Act") for access to a number of documents held by the first respondent relating to the nominations. The documents she sought were "working manuals, policy guidelines and criteria related to the administration of awards within the Order of Australia [and] documents relating to review processes i.e. right of appeal in cases of maladministration". Under s 6A of the FOI Act, only documents of the Official Secretary relating to matters of an administrative nature were accessible. On 25 February 2011, the Deputy Official Secretary to the Governor-General refused the appellant's request on the basis that the documents sought did not relate to matters of an administrative nature.

On 9 August 2011, the Information Commissioner affirmed the decision under s 55K of the FOI Act and on 30 April 2012 the Administrative Appeals Tribunal affirmed the decision under review.

The appellant appealed to the Federal Court of Australia. The major question in the appeal was the construction of s 6A of the FOI Act. On 19 December 2012, the Full Court (Keane CJ, Besanko and Robertson JJ) concluded that a document that relates to a substantive power of function of the Governor-General is not a "document [that] relates to matters of an administrative nature" and dismissed the appeal with costs.

The grounds of appeal are:

The Federal Court erred:

- In holding that the FOI Act did not apply to the appellant's requests for access to documents made on 26 and 30 January 2011 by reason of s 6A of that Act;
- In holding that any document that "relates to [a] substantive power or function" of the Governor-General is not a document that "relates to matters of an administrative nature" within the meaning of s 6A, and is thereby excluded from the coverage of the Act;
- In characterizing each document the subject of the requests as a document that "relates to [a] substantive power or function" of the Governor-General.

The first respondent has issued a notice pursuant to section 78B of the *Judiciary Act*.

LI v CHIEF OF ARMY (S162/2013)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 20 and [2013] FCAFC 40

Dates of judgment: 26 February 2013 and 19 April 2013

Special leave granted: 16 August 2013

Major Ting Li is a legal officer with the Australian Defence Force. On 3 February 2010 he had an altercation with Mr Andrew Snashall, Director of Special Financial Claims, who worked in the same building. Mr Snashall had allegedly once (in about July 2009) made a comment which Major Li believed was a racial slur. On several subsequent occasions Mr Snashall had asked Major Li not to interrupt his staff by chatting with them. On 2 February 2010 one such occasion was immediately followed by a heated exchange between the men. The next morning, Major Li visited Mr Snashall in his office and began airing grievances with him. After Major Li then refused a request by Mr Snashall to leave his office, Mr Snashall walked out. Major Li followed him as he walked into the hallway and then back to the office. Major Li then prevented Mr Snashall from closing his office door. Staff nearby gathered as the two men's voices grew louder and more aggressive. Major Li then left the scene after two staff members had intervened.

Major Li was later charged with having "created a disturbance by causing a confrontation with Mr Snashall." Section 33(b) of the *Defence Force Discipline Act* 1982 (Cth) ("the Act") provides that a Defence member is guilty of an offence if he or she creates a disturbance on service land. After pleading not guilty, Major Li was tried and convicted by a Court Martial. He was severely reprimanded and fined $5,000, suspended as to $3,000.

After the Defence Force Discipline Appeal Tribunal ("the Tribunal") dismissed an appeal against his conviction, Major Li appealed to the Federal Court.

On 26 February 2013 a majority of the Full Court (Keane CJ, Jagot & Yates JJ; Dowsett & Logan JJ dissenting) dismissed Major Li's appeal. The majority held that, in light of ss 3, 4 and 5 of the *Criminal Code* (Cth), the relevant physical element of the charged offence was "conduct" rather than a circumstance or a result. The fault element was therefore an intention to engage in the conduct alleged in the particulars to the charge. The majority found that the Judge Advocate had not erred by directing the Court Martial panel to determine any intention of Major Li's to engage in the alleged conduct, rather than any intention to create a disturbance. Justices Dowsett and Logan however each held that the Court Martial panel should have been directed to find whether Major Li had intended the relevant physical element of the offence, which was to "create a disturbance". Justice Dowsett found that the Judge Advocate's misdirection had given rise to a miscarriage of justice, as Major Li had been deprived of the opportunity to have the correct question of his intention decided by the panel. Justice Logan also found a miscarriage of justice, on the basis that the evidence before the Court Martial could not demonstrate that Major Li had created a "disturbance" (as his Honour had construed that word).

The grounds of appeal include:

- The majority erred in law by failing to hold that an intention to create a disturbance was a necessary mental element in the offence under s 33(b) of the Act.

- The majority erred in law by failing to hold that the Judge Advocate erred in law in the direction that an intention to create a disturbance was not necessary.

On 6 September 2013 a notice of contention was filed, the sole ground of which is:

- To the extent, if at all, that Major Li did not abandon the questions of law posed in his amended notice of appeal and adopt the questions stated at [38] of reasons of the court below, the Full Court of the Federal Court failed to decide the Chief of Army's Notice of Objection to Competency. The questions identified in the amended notice of appeal in the court below were not "questions of law involved in a decision of the Tribunal", as a result of which that court did not have jurisdiction under s 53 of the Act.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v TPG INTERNET PTY LTD (M98/2013)

Court appealed from: Full Federal Court of Australia
[2012] FCAFC 190 & [2013] FCAFC 37

Date of judgment: 20 December 2012 & 4 April 2013

Date special leave granted: 16 August 2013

The respondent ('TPG') carries on business as a provider of telephone and internet services to residential customers throughout Australia. In September 2010 TPG launched a national advertising campaign, which ran for over 13 months, in which it highlighted an offer to provide customers with unlimited ADSL2+ broadband for $29.99 per month. The advertisements went on to say, although in a less prominent manner, that the advertised rate of $29.99 per month was only available to persons who bundled the ADSL2+ service with a home telephone line from TPG at an additional $30 per month. In early October 2010, the appellant ('ACCC') wrote to TPG expressing concern that the bundling condition was stated in small, difficult to read print, which was insufficient to qualify the "dominant headline representation" in the advertisements. The ACCC therefore considered that TPG's advertisements amounted to misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act* (1974) (Cth) ('the Act'). Shortly after it received notice of the ACCC's concerns, but without accepting the correctness of them, TPG amended the form of all of the advertisements used in the first three weeks of its advertising campaign.

The primary judge (Murphy J) found that all of the initial advertisements and most of the revised advertisements conveyed a representation to the relevant class of consumers that they could purchase unlimited ADSL2+ from TPG without being obliged to acquire any additional service and without the need to pay any additional charge. Thus, his Honour found that all of those advertisements constituted conduct by TPG that was misleading and deceptive in breach of s 52 of the Act (when published before 1 January 2011) and s 18 of Sch. 2 Australian Consumer Law (ACL) of the *Competition and Consumer Act* (2010) (Cth) (when published after 1 January 2011). His Honour also found that all of those advertisements contained false representations in breach of ss 53(e) and (g) of the Act and ss 29(1)(i) and (m) of the ACL. His Honour ordered a number of forms of relief including declarations, injunctions, corrective advertising and pecuniary penalties totalling $2 million.

TPG appealed to the Full Federal Court of Appeal (Jacobson, Bennett and Gilmour JJ). The Court noted that, in determining whether an advertisement is misleading or deceptive it is necessary to look at the whole of the advertisement in its full context. Where, as in the present case, the advertisements were directed at members of a class in a general sense, the enquiry is concerned with the impact of each advertisement on the hypothetical reasonable member of the class of persons to whom the advertisement was directed. The Court held that in this case consumers to whom the advertisements were directed must be taken to have some familiarity with the market for the provision of broadband services: in particular, they would know that services such as ADSL2+ are offered for sale as either "bundled" or "stand alone".

The primary judge answered the critical question by finding that the dominant message in each of the relevant advertisements was that the reader or viewer could

acquire ADSL2+ for $29.99 per month without incurring an obligation to acquire any additional service or to pay any further charges. On that approach, the ordinary or reasonable reader would be misled unless the misleading dominant message was corrected by a sufficiently clear and prominent statement which prevented the inaccurate dominant message from being misleading, or likely to mislead or deceive. The Full Court considered that was not the correct approach. While many people would have only absorbed the general thrust of the advertisements, this was not a mandate for ignoring the rule that the whole of the advertisement must be considered in its full context. The approach of the primary judge did not take into account the need to have regard to the attributes of the hypothetical reader or viewer, which included knowledge of the "bundling" method of sale commonly employed with this type of service, as well as knowledge that setup charges are often applied. When seen through that prism, the Full Court found that the advertisements were not misleading.

The Full Court could, however, see no appellable error in the primary judge's finding that the initial print and initial online advertisements contravened s 53C of the Act, on the basis that the specification of the minimum charge did not stand out so as to be conspicuous or strike the attention and was not easily seen or very noticeable in the advertisements. TPG was ordered to pay a pecuniary penalty of $50,000 in respect of that contravention of the Act.

The grounds of appeal include:

- The Full Court erred in making a finding that was not properly open to it as a matter of fact and law to the effect that the consumers to whom the TPG advertisements were directed would have known that the respondent's internet services were bundled with telephony services;

- The Full Court erred in failing to adequately consider the issue of deterrence, both specific and general, resulting in a manifestly inadequate penalty of $50,000 being ordered.

UNIONS NSW & ORS v STATE OF NEW SOUTH WALES (S70/2013)

Date special case referred to Full Court: 12 August 2013

Certain provisions of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) ("the Act") impose restrictions on the funding and expenditure of political parties, Members of the New South Wales Parliament, third-party campaigners and candidates (and groups thereof) standing for election to the Parliament.

Section 96D of the Act prohibits any such person or body from accepting political donations unless the donor is an individual who is enrolled to vote. (Prior to amendments which took effect on 9 March 2012, political donations could also be accepted from any entity that had an Australian Business Number.)

Section 95F of the Act prescribes caps on the amounts of "electoral communication expenditure" (as defined in s 87(2)) that can be made by parties, candidates and third-party campaigners for a State election campaign. Section 95I makes it unlawful for any of those caps to be exceeded.

If the expenditure of a party is less than or equal to the relevant cap, section 95G(6) then operates to add any electoral communication expenditure made by affiliated organisations. An "affiliated organisation" is defined as a body authorised by a party's rules to participate in the pre-selection of candidates and/or to appoint delegates to the party's governing body.

Of political donations made to the major parties in New South Wales, the great majority (in terms of total dollar value) have been made by organisations and associations rather than by individuals. The party with the highest proportion of non-individual donations is the ALP NSW, which is a branch of the Australian Labor Party.

The Plaintiffs are all trade unions or associations thereof. On 8 April 2013 they commenced proceedings in this Court, challenging the validity of sections 95F, 95G(6), 95I and 96D of the Act. Some of the Plaintiffs are affiliated with, and most have made donations to, ALP NSW. Each of the Plaintiffs is registered under the Act as a third-party campaigner and has made "electoral communication expenditure" within the meaning of the Act.

The Plaintiffs also filed a Notice of a Constitutional Matter on 8 April 2013. As at the time of writing, the Attorneys-General of the Commonwealth, Queensland, Western Australia and South Australia have each advised this Court that they will be intervening in this matter.

On 12 August 2013 the parties filed a special case, which Chief Justice French then referred to the Full Court.

The questions of law stated for the Court in the special case are:

1. Is section 96D of the Act invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

2. Are sections 95F, 95G(6) and 95I of the Act invalid (in whole or in part and, if in part, to what extent), because they together impermissibly burden the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

3. Do sections 7A and 7B of the *Constitution Act* 1902 (NSW) give rise to an entrenched protection of freedom of communication on New South Wales State government and political matters?

4. If so, is section 96D of the Act invalid because it impermissibly burdens that freedom, contrary to the New South Wales Constitution?

5. Further, if the answer to question 3 is "yes", are sections 95F, 95G(6) and 95I of the Act invalid (in whole or in part and, if in part, to what extent), because they together impermissibly burden that freedom, contrary to the New South Wales Constitution?

6. Is section 96D of the Act invalid under section 109 of the Commonwealth Constitution by reason of it being inconsistent with section 327 of the *Commonwealth Electoral Act* 1918 (Cth)?

7. Is section 96D of the Act invalid under section 109 of the Commonwealth Constitution by reason of it being inconsistent with Part XX of the *Commonwealth Electoral Act* 1918 (Cth)?

8. Is section 96D of the Act invalid because it impermissibly burdens a freedom of association provided for in the Commonwealth Constitution?

9. Who should pay the costs of the special case?

JAMES v THE QUEEN (M102/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2013] VSCA 55

Date of judgment: 19 March 2013

Date special leave granted: 16 August 2013

On 26 April 2007 Khadr Sleiman (KS) suffered serious injury when he was struck by a vehicle driven by the appellant (James). James was charged with one count of intentionally causing serious injury and an alternative count of recklessly causing serious injury. At his trial in the Supreme Court of Victoria, James contended that he did not intend to cause Sleiman serious injury. Alternatively, he claimed that he acted in self-defence, because he was fearful that Sleiman wanted to try and stab him with a knife. On 8 September 2011, James was convicted on the count of intentionally causing serious injury.

In his appeal to the Court of Appeal (Maxwell P and Whelan JA, Priest JA dissenting) James contended that a miscarriage of justice resulted from the trial judge's (Williams J) failure to leave to the jury possible alternative verdicts of intentionally, or recklessly, causing injury (as opposed to *serious* injury). In rejecting that contention, the majority of the Court noted that the issue in controversy in the trial as to intention did not concern the severity of the injury intended: rather, it concerned whether *any* injury was intended. The issue was whether the impact between the vehicle and KS was deliberate or not. It was never suggested that it might be open to conclude that James had struck KS deliberately with an intention of causing injury, rather than serious injury. There was little evidence which raised the lesser alternative offences as real possibilities. No party relied upon that evidence to suggest that conviction on the lesser alternatives was open. It was an 'all or nothing' case involving injuries which were serious on any view. Further, defence counsel throughout the trial had implicitly accepted that, if James had struck KS deliberately, the requisite state of mind in terms of serious injury must follow. It was obvious that defence counsel had, for forensic reasons, deliberately decided not to ask the judge to direct the jury about the lesser alternatives.

Priest JA (dissenting), held that if the evidence in a trial raises an alternative verdict as a realistic possibility, so that the jury might convict on it in preference to a more serious principal offence, the interests of justice generally dictate that an alternative verdict should be left. He thought it was plain that a verdict on a lesser alternative was realistically open on the evidence in this case. Failure to leave the alternatives was therefore an error which resulted in a substantial miscarriage of justice, since it could be said that conviction on the first count on the presentment was inevitable had it not been for the error.

The grounds of appeal are:

- The Court of Appeal erred in holding that, in trials other than for the offence of murder, a trial judge's duty to leave to a jury for its consideration lesser alternative verdicts - which are realistically, or fairly and practically open, on the evidence, does not transcend the forensic decisions of trial counsel.

- The Court of Appeal erred in holding that the trial judge was not bound to leave to the jury for its consideration the lesser alternative of causing injury intentionally (as an alternative to causing serious injury intentionally) and causing injury recklessly (as an alternative to causing serious injury recklessly).