SHORT PARTICULARS OF CASES

MAY 2017

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BROWN & ANOR v THE STATE OF TASMANIA (H3/2016)

Date Special Case referred to Full Court: 13 December 2016

The issue in this proceeding is whether the *Workplace (Protection from Protesters Act*) 2014 (Tas) ('the Act'), in whole or in part, contravenes the implied freedom of political communication in the Commonwealth Constitution.

The plaintiffs were each arrested and charged, purportedly under the Act, in early 2016 as a result of their onsite political protest against the proposed logging of the Lapoinya Forest in Tasmania. The respective criminal proceedings against them were abandoned by the police after the commencement of this proceeding. The plaintiffs contend that the Act is either wholly invalid or, at the least, is invalid in so far as it applies to forestry operations on forestry land as defined in s 3 of the Act.

The Act allows police officers to prevent the commencement or continuation of an onsite political protest that they reasonably believe is preventing, hindering or obstructing or is about to prevent, hinder or obstruct a "business activity" at any "business premises" or "business access area" as defined in s 3 of the Act, anywhere in Tasmania. The key provisions empower police officers to prevent the commencement or continuation of onsite political protests by directing the protesters to leave and stay away from business premises and business access areas for up to three months under pain of arrest and of criminal penalties if they do not do so.

The plaintiffs contend that ss 6 and 7 of the Act target and single out for prevention and punishment onsite political protest and protesters without any broader purpose of preserving, enhancing or protecting political communication. Further, they contend that no reasonable provision has been made in the Act to preserve or protect political communication.

The defendant contends that the Act protects (amongst other things) business activity lawfully carried out on land in the lawful possession of a business operator, and that the plaintiffs are seeking to prevent, hinder or obstruct activity of that nature. They submit that the Act does not restrict protest activity on land other than business premises or business access areas; it has a narrow operation and effect; it is compatible with the freedom and is in any event reasonably and appropriately adapted to the fulfilment of a legitimate purpose.

On 13 December 2016 Gordon J referred the Special Case for consideration by the Full Court. Notices of Constitutional Matter have been served. The Attorneys-General for the Commonwealth, Victoria, New South Wales, Queensland, and South Australia have filed Notices of Intervention. The Human Rights Law Centre has applied to appear as amicus curiae.

The question in the Special Case is:

- Is the *Workplace (Protection from Protesters) Act* 2014 (Tas), either in its entirety or in its operation in respect of forestry land, invalid because it impermissibly burdens the implied freedom of political communication contrary to the Commonwealth Constitution?

RAMSAY HEALTH CARE AUSTRALIA PTY LTD v COMPTON (S53/2017)

Court appealed from: Full Court of the Federal Court of Australia
[2016] FCAFC 106

Date of judgment: 17 August 2016

Special leave granted: 10 March 2017

On 4 June 2015 Ramsay Health Care Australia Pty Ltd ("Ramsay Health Care") filed a creditor's petition in the Federal Court, seeking a sequestration order against the estate of Mr Adrian John Compton. The act of bankruptcy relied upon was Mr Compton's failure to pay Ramsay Health Care $9,810,312.00 pursuant to a judgment debt of the Supreme Court of New South Wales ("the Supreme Court judgment").

The Supreme Court judgment arose when Ramsay Health Care sued Mr Compton for $9,810,312.00 on a guarantee of the obligations of Compton Fellers Pty Ltd (in liquidation), trading as MediChoice. In that proceeding Mr Compton contended that the documents he signed did not pertain to the guarantee in question, but were "stand-alone" documents intended to signify his assent to a completely different proposed guarantee. (Mr Compton submitted that he thought he was signing a guarantee which would not expose him to any personal liability for amounts which might otherwise become due by MediChoice to Ramsay Health Care.) The Supreme Court however rejected that argument.

In the bankruptcy proceedings in the Federal Court, Mr Compton asked Justice Flick to separately determine whether he should "go behind" the Supreme Court judgment and inquire into the alleged debt. While a hearing of that separate question took place, Justice Flick answered that question in the negative.

On 17 August 2016 the Full Federal Court (Sipois, Katzmann & Moshinsky JJ) allowed Mr Compton's appeal. Their Honours found that the evidence before Justice Flick established, and Ramsay Health Care conceded, that there was an "open question" as to whether MediChoice in fact owed any money to Ramsay Health Care (and thus whether Mr Compton owed a debt to Ramsay Health Care pursuant to the guarantee). There were therefore substantial reasons for questioning whether there was "in truth and reality" a debt owing to Ramsay Health Care. The question of whether the Court should "go behind" the Supreme Court judgment should therefore have been answered in the affirmative. In reaching this conclusion their Honours noted that it is well established that a court exercising bankruptcy jurisdiction has the discretion to "go behind" a disputed judgment. In the circumstances of this case, the Full Court found that Justice Flick had focussed too much on Mr Compton's behaviour in the Supreme Court proceedings and too little on whether there was "in truth and reality" a debt due to Ramsay Health Care.

On 23 March 2017 Gageler J expedited the hearing of the appeal.

The grounds of appeal are:

- Whether the Full Court of the Federal Court of Australia, on the application by a debtor to "go behind" a judgment regularly obtained, erred in exercising its jurisdiction under section 52 of the *Bankruptcy Act* 1966 (Cth) by:

  a) failing to apply the test described in *Corney v Brien* (1951) 84 CLR 343 for going behind a judgment given after a fully contested hearing;

  b) finding that the Court may go behind a judgment in any circumstance in which the judgment debtor adduces evidence which shows that there is *"substantial reason to believe"* that he or she does not owe the debt, regardless of whether the debtor had the opportunity of taking that point at the earlier contested hearing; and

  c) failing to give any or sufficient weight to the principle of finality in litigation.

GAX v THE QUEEN (B72/2016)

Court appealed from: Queensland Court of Appeal
[2016] QCA 189

Date of judgment: 22 July 2016

Special leave granted: 16 December 2016

On 8 February 2016 the Appellant was convicted ("the conviction count") of the indecent treatment of his then 12 year old daughter in July 2003. He was also acquitted of two related counts of indecent treatment of the same complainant. With respect to the conviction count, the Complainant gave evidence that she awoke in her bed and found that, not only was the Appellant in bed with her, but that his hands were near where her underpants were supposed to be. She further said that the Appellant was in her bed for about five minutes before her mother unexpectedly came into her room. The Appellant contended that none of the events, the subject of any of the counts, ever occurred. The Appellant was then sentenced by Judge Smith to 12 months imprisonment, a sentence which was suspended after 5 months.

The Appellant appealed against his conviction on two grounds. The first was that the verdict was unreasonable and could not be supported by the evidence. The second was that the guilty verdict was inconsistent with the not guilty verdicts on the other counts.

On 22 July 2017 the Queensland Court of Appeal (Morrison JA & Atkinson J; McMurdo P dissenting) dismissed the Appellant's appeal. The majority held that the Complainant's evidence was supported in important ways by both her mother and her sister. They further held that the relatively minor inconsistencies in the witnesses' evidence suggested not only an absence of collusion, but that they were all describing the same event. The majority further held that the relative strength of the evidence on the conviction count provided a rational basis for a conviction on that count but not the other two counts. The verdict therefore should not be set aside on the ground that it was unreasonable, nor could it be said that it was unsupported by the evidence.

President McMurdo however would have allowed the appeal. Her Honour found that the inconsistencies in the witnesses' evidence, the 10 year passage of time until the making of the complaint and the Complainant's admittedly own poor memory meant that a jury could not be satisfied beyond reasonable doubt as to the Appellant's guilt.

The grounds of appeal are:

- The majority of the Court of Appeal failed to make an independent assessment of the sufficiency and quality of the evidence in determining the reasonableness of the verdict of guilty.

- The majority of the Court of Appeal erred in not concluding that the verdict was unreasonable.

PLAINTIFF S195/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (CTH) & ORS (S195/2016)

Amended application for an order to show cause filed: 11 January 2017

Special case referred to Full Court: 13 March 2017

The Plaintiff is an Iranian citizen who, around 21 July 2013, was on board a vessel that was intercepted at sea by officers of the Commonwealth of Australia ("the Commonwealth"). He was taken to Christmas Island on 24 July 2013 and was then considered to have entered the "migration zone" as defined by s 5 of the *Migration Act* 1958 ("the Act"). The Plaintiff did not hold a visa upon entering the migration zone and accordingly he became an "unlawful non-citizen" as defined in s 5AA of the Act and was consequently detained. On 26 August 2013 the Plaintiff was transferred to Papua New Guinea ("PNG") pursuant to s 198AD(2) of the Act.

The Plaintiff, who claims to be a refugee, applied to the Immigration and Citizenship Service of PNG to be recognised by PNG as a refugee under the PNG Migration Act. On 1 July 2016 he was the subject of an initial negative assessment and he did not apply for merits review of that assessment. The Plaintiff also did not participate in the assessment of his refugee claims in PNG. This was because he feared reprisals if he remained in PNG after giving evidence (in PNG) as an eyewitness against the perpetrators of the murder of Reza Barai. (The perpetrators were later convicted and sentenced to substantial terms of imprisonment.)

On 12 December 2016 the relevant PNG Minister made a final ministerial determination, finding that the Plaintiff was not a refugee. On that date the PNG Minister also ordered the removal of the Plaintiff from PNG, along with his detention pending that removal. For its part, Iran has a longstanding policy of not cooperating on involuntary returns to that country. While that policy is in place, PNG will be unable to remove the Plaintiff to Iran without his approval.

While in PNG the Plaintiff has been residing at the Manus Island Regional Processing Centre ("Manus RPC"). (Pursuant to a series of contracts with the Commonwealth of Australia, Broadspectrum Pty Ltd runs the Manus RPC and the East Lorengau Refugee Transit Centre.) Since about May 2016 however, the Plaintiff has been able to come and go from the Manus RPC subject to certain conditions. At the time of writing, no steps have been taken to detain the Plaintiff pursuant to the 12 December 2016 Ministerial order.

On 26 April 2016 the Supreme Court of Justice of PNG delivered judgment in *Belden Norman Namah v Hon. Rimbink Pato, Minister for Foreign Affairs* ("the Namah Decision"). In that case, the Court considered whether the bringing into PNG (by the Commonwealth government) and the detention of asylum seekers at Regional Processing Centres was contrary to their constitutional rights of personal liberty guaranteed by s 42 of the Constitution. On that question, the Court held that the arrangements (between the Commonwealth and PNG governments) leading to the forceful bringing into and detention of asylum seekers in Regional Processing Centres was unconstitutional and therefore illegal.

On 13 March 2017 Justice Bell referred a special case containing the following questions to the Full Court for its consideration:

1. Was the designation of PNG as a regional processing country on 9 October 2012 beyond the power conferred by s 198AB(1) of the Act by reason of the *Namah Decision?*

2. Was entry into:

   a) the 2013 Memorandum of Understanding;
   b) the Regional Resettlement Arrangement;
   c) the 2014 Administrative Arrangements; and
   d) the Broadspectrum Contract,

   beyond the power of the Commonwealth conferred by s 61 of the Constitution and/or s 198AHA of the Act by reason of the *Namah Decision?*

3. Was the direction made by the Minister on 29 July 2013 beyond the power conferred by s 198AD(5) of the Act by reason of the *Namah Decision*?

4. Was the taking of the Plaintiff to PNG on 21 August 2013 beyond the power conferred by s 198AD of the Act by reason of the *Namah Decision*?

5. Is the authority for the Commonwealth to undertake conduct in respect of regional processing arrangements in PNG conferred by s 198AHA of the Act dependent on whether those arrangements are lawful under the law of PNG?

6. Is the Commonwealth precluded from assisting PNG to take action pursuant to the orders outlined at paragraph 35 [of the special case] by reason of the *Namah Decision*?

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

The parties agree that questions 1 to 4 and 6 do not raise any questions as to the validity of the actions referred to other than by reason of the *Namah Decision*.

STATE OF NEW SOUTH WALES v DC & ANOR (S35/2017)

Court appealed from: New South Wales Court of Appeal
[2016] NSWCA 198

Date of judgment: 10 August 2016

Special leave granted: 10 February 2017

The Respondents, DC and TB, are sisters who were subjected to physical and sexual abuse by their stepfather between 1974 and 1983. In April 1983, when TB was aged 15 years and DC was aged 12, TB complained of the abuse to the then Department of Youth and Community Services ("the Department"). An officer of the Department, Ms Carolyn Quinn, immediately interviewed both girls and removed them from the family home. The following month, Ms Quinn commenced proceedings in the Cobham Children's Court, which later ordered that the Respondents return to live with their mother on condition that the girls have no contact with their stepfather except at their request. (The stepfather had by that time moved out of the family home but continued to visit the Respondents' mother.) The stepfather meanwhile admitted, during an interview conducted by Ms Quinn and another officer of the Department, that he had sexually interfered with the Respondents.

The stepfather's abuse was not reported to the police, however, until the Respondents did so in August 2001. In September 2006 the stepfather was convicted of nine offences, including the rape and indecent assault of each of the Respondents and assault occasioning actual bodily harm to TB.

The Respondents later commenced Supreme Court proceedings against both the Appellant ("the State") and Ms Quinn. The Respondents claimed damages for harm they allegedly suffered after April 1983 on account of the Department's negligent failure to report the stepfather's abuse to the police. The Respondents contended that the Department should have reported their complaints to the police, by exercising a discretionary power to do so that was conferred on the Director of Child Welfare (the head of the Department) by s 148B(5) of the *Child Welfare Act* 1939 (NSW) ("the Act").

On 22 May 2015 Justice Campbell dismissed the Respondents' claim. His Honour found that the Department owed the Respondents a duty to use reasonable care in the exercise of its power under s 148B(5) of the Act, and that that duty had been breached by a failure to report the stepfather's abuse to the police. Justice Campbell however found that the evidence did not establish that the abuse had continued after TB's complaint in April 1983. (His Honour dismissed the claim as against Ms Quinn on the basis that she owed no duty in relation to the relevant power under the Act.)

The Court of Appeal by majority (Ward JA & Sackville AJA; Basten JA dissenting) allowed an appeal by the Respondents and ordered the State to pay damages of $536,463.60 to DC and $939,435.60 to TB. The majority found that the stepfather had continued to sexually abuse the Respondents after the time of TB's complaint to the Department. Their Honours then held that Justice Campbell had not erred in finding negligence on the part of the Department.

Justice Basten however held that the duty of care owed to the Respondents did not extend to reporting the abuse to the police. This was because such a scope of duty would oblige officers of the Department to consider an interest (the public interest in the prosecution of offenders) that was potentially inconsistent with the proper exercise of functions (of child protection) under the Act. His Honour also considered that the State could be held vicariously liable for the negligence of a particular officer but not for an asserted negligence on the part of "the Department". Justice Basten found that Justice Campbell had not erred by failing to be satisfied on the evidence that the stepfather had continued to abuse the Respondents after April 1983.

The grounds of appeal are:

- The Court of Appeal should have found that any duty of care owed to the Respondents by the State through the Director of Child Welfare in 1983 did not extend to exercising a statutory power to report to police allegations of criminality by the Respondents' stepfather following interviews with the Respondents by officers of the State in April 1983.

- The Court of Appeal erred in failing to identify the basis upon which the State could be held liable by reason of a direct duty owed to the Respondents or vicariously liable for omissions of an officer or officers of the State in circumstances where there was no finding that any such officer was negligent in the performance of any duty.

TRANSPORT ACCIDENT COMMISSION v KATANAS (M160/2016)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2016] VSCA 140

Date of judgment: 17 June 2016

Date special leave granted: 18 November 2016

The respondent issued a proceeding in the County Court of Victoria by which she sought leave, pursuant to s 93(4)(d) of the *Transport Accident Act* 1986 (Vic) ('the Act'), to commence proceedings at common law in respect of psychological injury sustained by her as a result of a transport accident on 10 July 2010. The judge who heard her application (Judge O'Neill) was not satisfied that the mental disorder suffered by the applicant constituted a 'severe' injury as required by s 93(17)(c) of the Act, and accordingly dismissed the application.

The respondent's appeal to the Court of Appeal (Ashley and Osborne JJA, Kaye JA dissenting) was successful. The majority of the Court found that Judge O'Neill misdirected himself in the following passage of his judgment:

> *In order to satisfy the test posed in ss (c), the consequences arising from a transport accident must be more substantial than the test posed under ss (a); that is, they must be more than 'very considerable' when a comparison is made with other cases in the possible range of impairments. Thus, consideration must be given to the vast array of mental disorders which may be encountered following a transport accident. At one end of the spectrum is mild anxiety as a result of trauma, easily overcome without medical intervention. At the other end of the spectrum are those disorders which provoke the most extreme symptoms and consequences, including psychoses, admission to psychiatric hospitals as an inpatient, delusional beliefs and thoughts, suicidal ideation and suicide attempts. Such conditions require extensive treatment and medication. It follows that for a mental disorder to be described as being 'severe', it is at the upper echelon of those disorders in the possible range.*

The majority found that the effect of what the judge said in the impugned passage was that the spectrum of least case to worst case was established by setting up, at the one end, a mild condition not requiring treatment; and at the other end, grave psychiatric disorders provoking the most extreme symptoms and consequences, such as to require extensive treatment and medication; and then to say that it followed that for a mental disorder to be described as 'severe', it was 'at the upper echelon of those disorders in the possible range.'

While not doubting that the extent of treatment made necessary by a psychiatric disorder may cast light on whether the disorder should be accounted as severe, the majority found that the spectrum which the judge described was only one amongst a number of ways in which the question of severity might be approached, each of them being incomplete in itself. But whilst each spectrum would be relevant to determine whether the statutory test was satisfied in the particular case, no one of them, by itself, would answer the critical question. The correct thing to do, in each case, was to first identify and next bring to account all relevant circumstances personal to the claimant; and then to apply the statutory test, making a value judgment as described in *Humphries v Poljak* [1992] 2

VR 129. In making that value judgment, a judge must give to each identified relevant circumstance the weight which appears to be appropriate.

Kaye J considered that an analysis of the judge's reasons made it plain that the judge did not adopt or apply a test that focused solely, or primarily, on determining whether the symptoms of the applicant's disorder, and the treatment she had received for it, were such that the disorder might be described as 'severe'. Rather, the judge correctly and appropriately applied a test that took into account, as it should, the nature of the applicant's disorder, its symptomatology, its treatment, and the consequences of it to her.

The ground of appeal is:

- The Court of Appeal erred in finding that the primary judge misdirected himself at [82] of the judgment.