

SHORT PARTICULARS OF CASES
APPEALS

CANBERRA SITTINGS
JUNE 2009

No.	Name of Matter	Page No
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TUESDAY, 16 JUNE 2009

1.	Bakewell v. The Queen	1
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WEDNESDAY, 17 JUNE 2009

2.	ACQ Pty Limited v. Cook & Anor Aircair Moree Pty Limited v. Cook & Anor	3
----	--	---

THURSDAY, 18 JUNE 2009

3.	Sydney Water Corporation v. Turano & Anor	5
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BAKEWELL v THE QUEEN (D5/2009)

Court appealed from: Court of Appeal of the Supreme Court of the Northern Territory [2008] NTSC 51

Date of grant of special leave: 1 May 2009

In May 1989 the appellant, Jonathon Peter Bakewell, was sentenced to life imprisonment for a murder in the course of which the appellant sexually assaulted the victim. There was at that time no provision for the fixing of a non-parole period for murder convictions. On 11 February 2004 the *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT) (“the Act”) came into effect, which imposed an automatic 20 year non-parole period for life sentences imposed for convictions for single murder, absent certain aggravating and other circumstances. The Act provided in s19 for the Director of Public Prosecutions to apply to the Supreme Court to fix a non-parole period of at least 25 years or to refuse to fix any period where aggravating circumstances were found (including, relevantly, that the murder occurred as part of a course of conduct which included sexual assault). In June 2007, the Director made such an application and the Supreme Court (per Southwood J) revoked the appellant’s 20 year non-parole period and ordered a non-parole period of 25 years. Southwood J found that, the aggravating circumstances having been established (that is, the sexual assault), he had no discretion but to revoke the appellant’s 20 year non-parole period and impose a 25 year period. This decision was reversed on appeal to the Court of Appeal (*Bakewell v The Queen* [2008] NTCA 3), the Court concluding that the primary judge erred in concluding that he was bound to revoke the 20 year period and fix a term of 25 years, and holding that the discretion in s19(3) of the Act to dismiss the Director’s application was unconstrained.

An application for special leave to appeal against this decision was refused on 17 October 2008 (*The Queen v. Bakewell* [2008] HCASL 551, per Gummow and Kiefel JJ). By the time that the application for special leave was ready for hearing, the *Sentencing (Crime of Murder) and Parole Reform Amendment Act 2008* (NT) came into effect, and pursuant to those amendments (“the 2008 amendments”), the Director made a further application to the Supreme Court to have the 20 year non-parole period revoked and a 25 year period fixed. This Court accepted that those developments rendered the special leave application hypothetical.

It is uncontentionous as between the parties that the 2008 amendments were made in response to the earlier decision of the Court of Appeal to dismiss the Director’s first application, and to permit the making of the second application by the Director for revocation of the appellant’s 20 year non-parole period and fixing a 25 year period. The appellant by summons sought a permanent stay of the Director’s application as an abuse of process or a contempt of the Court, and by motion sought declarations that subsections 19(3), 19(7) and 19(9) of the Act as amended were invalid because they infringe the principle in *Kable v. Director of Public Prosecutions (NSW)* [1996] HCA 24 or otherwise constitute an unwarranted interference with the judicial power of the Supreme Court. Questions of law were then referred to the Court of Appeal for determination. A majority of the Court (Martin (BR) CJ and Riley J; Thomas J dissenting) agreed with the respondent’s argument that it remains a matter for the Court to

determine whether a prescribed circumstance of aggravation as defined by s19(3) of the Act is established, and the limitation on the Court's sentencing discretion, after that determination has been made, is no different from the ordinary sentencing process following an adjudication of guilt where the applicable minimum and maximum penalties depend upon the existence or otherwise of circumstances defined in the relevant statutory provisions. Thomas J would have declared s19(9) of the Act invalid for imposing a duty on the Court to exercise a power inconsistent with the constitutional functions of the Court. Thomas J held that it would be artificial in the extreme to say that a judge could now entertain an argument that there were no aggravating circumstances as defined in s19(3), and that s19(9) has only one purpose which is to increase the appellant's penalty without any new findings as to guilt or criminality.

In the appeal, the appellant challenges the validity of s19(9) and s19(10) of the Act but not of s19(3) or s19(7).

The grounds of appeal include:

- Whether subsections 19(9) and 19(10) of the *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT) as amended are invalid in their application to the appellant because:
 - They infringe the principle in *Kable v. Director of Public Prosecutions (NSW)* [1996] HCA 24; or
 - They otherwise constitute an unwarranted interference with the judicial power of the Supreme Court of the Northern Territory;
- Whether subsections 19(9) and 19(10) of the Act are constitutionally invalid as conferring on the Supreme Court a function which substantially undermines the institutional integrity of the Court inconsistent with the Court's role as a repository of Federal jurisdiction.

On 12 May 2009 the appellant filed a Notice of Constitutional Matter. The Attorneys-General of the Commonwealth, Victoria, Western Australia, South Australia and New South Wales have intervened in the appeal.

ACQ PTY LIMITED v COOK & ANOR (S107/2009)
AIRCAIR MOREE PTY LIMITED v COOK & ANOR (S108/2009)

Court appealed from: New South Wales Court of Appeal [2008] NSWCA 161

Dates of judgment: 16 July 2008 & 17 November 2008

Date of grant of special leave: 1 May 2009

Mr Gregory Cook was a linesman employed by NorthPower, a company now known as Country Energy. On 28 December 2000 he suffered a serious electric shock while trying to repair a power-line felled by a low flying light aircraft. The aircraft in question was owned by ACQ Pty Ltd ("ACQ"), it was operated by Aircair Moree Pty Ltd ("Aircair") and it was piloted by a Mr Stubbs. Mr Cook sued both Country Energy and Aircair in negligence. (Aircair was sued on the basis that it was vicariously liable for its pilot's negligence.) Mr Cook also sued Aircair and ACQ pursuant to the *Damage by Aircraft Act 1999* (Cth) ("DAA").

The trial judge, Judge Johnstone, found that Mr Cook's injuries were caused by both Country Energy's and Mr Stubbs' negligence. His Honour also held that the circumstances of Mr Cook's accident fell within the ambit of section 10 of the DAA. Both ACQ and Aircair were therefore liable to pay him damages pursuant to section 11 of the DAA. Judge Johnstone found however that the amount of damages recoverable from Country Energy should be reduced by 40% on account of Mr Cook's contributory negligence.

Aircair and ACQ unsuccessfully sought an indemnity or contribution from Country Energy under section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* ("the 1946 Act"). Country Energy also sought a contribution on a similar basis from Aircair and ACQ. Judge Johnstone held that Country Energy could recover a 50% contribution from Aircair. The damages recoverable against Country Energy were assessed in accordance with section 151G of the *Workers Compensation Act 1987* at \$433,860.00. That sum was to be reduced by 40% for contributory negligence. Damages against Aircair and ACQ were assessed in accordance with the *Civil Liability Act 2002* (NSW) at \$953,141.00.

Four separate appeals followed, with judgment in the substantive matters being delivered by the Court of Appeal (Beazley, Giles & Campbell JJA) on 16 July 2008. Consequential orders as to costs followed on 17 November 2008.

Matter number CA40454/07 was an appeal in which Country Energy was the Appellant and Mr Cook and Aircair were the Respondents. That appeal was allowed, with judgment in favour of Country Energy being entered in lieu of the lower court's judgment in favour of Mr Cook. The order that Country Energy had obtained against Aircair for a contribution to its damages was also set aside.

Matter number CA40363/07 was an appeal by Mr Cook in which Country Energy was the Respondent. It related to Judge Johnstone's assessment of Mr Cook's contributory negligence in the action he brought against Country Energy. As Mr Cook's action against Country Energy ultimately failed, his appeal also failed.

In matter number CA40302/07 the Court of Appeal held that ACQ must pay the costs of Country Energy and Mr Cook in both the appeal and in the court below. Their Honours also held that in matter number CA40303/07 Aircair was to pay Country Energy's and Mr Cook's costs of the appeal and in the court below.

The ground of appeal (in both matters) is:

- The Court of Appeal erred by holding that the Plaintiff's injuries were caused by something that was a result of an impact with an aircraft that is in flight, within the meaning of paragraph 10(1)(d) of the DAA, in circumstances where the Plaintiff was employed, with appropriate skills and experience, to inspect and deal with the very kind of dangerous electricity transmission line that the aircraft had hit and displaced.

On 5 June 2009 Aircair filed a notice of cross-appeal in matter number S108/2009, the ground of which is:

- The Court of Appeal was wrong in finding the pilot did not owe a duty of care to Mr Cook.

SYDNEY WATER CORPORATION v TURANO & ANOR (S104/2009)

Court appealed from: New South Wales Court of Appeal [2008] NSWCA 270

Date of judgment: 31 October 2008

Date of grant of special leave: 1 May 2009

On 18 November 2001 Mr Napoleone Turano was critically injured when a tree fell onto his car while he was driving along Edmondson Avenue, Austral. He died the following day. Mr Turano's wife, Mrs Maria Turano, and their two children were also passengers in that car and they, too, were injured. Mrs Turano later sued Liverpool City Council ("the Council") and the Sydney Water Corporation ("Sydney Water"), claiming damages for both physical and psychological injury, along with loss of dependency.

The principal factual issue at trial was what caused the tree to fall. While the immediate cause was strong wind, both Mrs Turano and the Council submitted that the roots of the tree had been affected by water from a nearby culvert and water main. Judge Delaney found that the Council (who built the culvert) was liable in negligence, but that Sydney Water (who built the water main) was not. His Honour also dismissed the cross-claims brought by the Council and Sydney Water against each other. The Council then appealed against that verdict, while Mrs Turano cross-appealed against the dismissal of her claim against Sydney Water.

On 31 October 2008 the Court of Appeal held that the Council was not liable to Mrs Turano in negligence. On Mrs Turano's cross-appeal against Sydney Water, Justices Beazley & Hodgson (Justice McColl dissenting) held that the harm suffered by Mrs Turano was causally related to Sydney Water's breach of duty. They found that Sydney Water had a duty to install the water main in a manner that did not compromise the integrity of the culvert drainage system. This was not done and Sydney Water was liable in negligence.

The grounds of appeal are:

- The majority erred in finding that the appellant utility authority owed a duty of care in 1981 to a class of persons, including the first respondent or her husband driving along a road in a storm 20 years later, being a duty to take care in installing a water main near the road which might alter sub-surface water flows to nearby vegetation.
- The majority erred in failing to distinguish clearly the conceptions of reasonable foreseeability, and the factual findings made in respect of them at the discrete stages of duty, breach and damage and in doing so denied those conceptions any real content.
- The majority consequently erred in findings of breach and causation and remoteness of damage.