SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 7 AUGUST 2012

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RCB AS LITIGATION GUARDIAN OF EKV, CEV, CIV AND LRV v. THE HONOURABLE JUSTICE COLIN JAMES FORREST, ONE OF THE JUDGES OF THE FAMILY COURT OF AUSTRALIA & ORS (B28/2012)

Date referred to the Full Court: 25 May 2012

The four children for whom RCB is litigation guardian are girls aged between 9 and 15 years. They were born in Italy and are Italian citizens. They became Australian citizens by descent on 16 November 2009. Their parents are the third defendant (mother) and the fourth defendant (father). The parents separated in Italy around January 2007 and in November 2008 they made a consensual separation agreement for joint custody of the four girls. Soon afterwards the mother decided to return, with the girls, to live in Australia and in 2010 she was able to secure the father's consent to the issue of passports for the four girls.

On 23 June 2010 the girls travelled to Australia with their mother. The ostensible purpose for travelling was to holiday for one month in Australia but they have been in Australia ever since.

The father remained in Italy and through the use of the provisions of the *Hague Convention* sought the girls return. On 18 February 2011, the second defendant, the Director-General, Department of Communities (Child Safety and Disability Services) filed an application under the *Family Law (Child Abduction Convention) Regulations* 1986 ("the Child Abduction Regulations") seeking return orders for the children under regulation 14 of the Child Abduction Regulations. The first defendant, Forrest J, heard that application for return orders on 16 May 2011 and on 23 June 2011 ordered that the children be returned to Italy. The mother appealed to the Full Court of the Family Court. That appeal was dismissed on 9 March 2012. The mother filed an application for special leave to appeal which was subsequently discontinued. On 4 May 2012 Forrest J ordered the mother to deliver the children to Brisbane International Airport at a date not before 16 May 2012. Subsequently, on 14 May 2012 Forrest J issued warrants for possession of each of the children. On 21 May 2012 the plaintiff filed an application for an order to show cause seeking relief against the orders of Forrest J. The plaintiff claims a writ of prohibition to prevent Forrest J from continuing to hear and determine the proceeding in the Family Court and a writ of certiorari to quash certain orders of his Honour.

The issues raised in the application include:

- Whether procedural fairness requires that in proceedings under the Child Abduction Regulations a child must be independently and separately represented whenever it appears that a child may object to being returned?

- If so, is s 68L(3) of the *Family Law Act* 1975 (Cth) invalid because it breaches Chapter III of the Constitution?

The plaintiff has filed a notice of a constitutional matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth). The Attorney-General of the Commonwealth of Australia, the Attorney-General for South Australia and the Attorney General for Western Australia propose to intervene in this matter.

SWEENEY (BHNF BELL) v THORNTON (S321/2011)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 244

Date of judgment: 23 August 2011

Referred to enlarged bench: 9 March 2012

On 27 August 2005 Miss Madeleine Sweeney was severely injured when the car that she was driving crashed on a country road. She was 16 years old and held a learner driver's licence. At the time of the accident Miss Sweeney was being supervised by Mr Andrew Thornton, who owned the car and held an unrestricted driver's licence. It was their fourth journey that day along the 35 km stretch of road with Miss Sweeney driving under Mr Thornton's supervision. The road was slightly wet. When traversing a bend, an irregularity in the road's surface caused the car's rear wheels to skid to the right. Miss Sweeney then over-corrected, turning the steering wheel too far to the right and then back to the left. She also removed her foot from the accelerator and suddenly depressed it again, instead of the brake. The car left the road and collided with a tree, causing Miss Sweeney's injuries. Miss Sweeney (by her next friend) then sued Mr Thornton for negligence. At the trial, Miss Sweeney could not remember the events of the fateful day.

On 10 September 2010 Justice Fullerton held that Miss Sweeney's injuries resulted from Mr Thornton's negligence. Her Honour found that the car had entered the bend at about 70 kph. Justice Fullerton held that this speed was unsafe in the conditions, having regard to Miss Sweeney's level of experience. Her Honour found that Mr Thornton had negligently failed to instruct Miss Sweeney to reduce her speed, or to take action himself to control the vehicle after it had begun to slide.

On 23 August 2011 the Court of Appeal (Campbell JA, Sackville & Tobias AJJA) unanimously allowed Mr Thornton's appeal. Their Honours found that Justice Fullerton had not addressed the question of whether a reasonable person in Mr Thornton's position would have instructed Miss Sweeney to enter the bend at a speed lower than 70 kph. No evidence had been given of any sign beside the road indicating that the bend required caution or a speed lower than the general limit of 100 kph. Further, Justice Fullerton had found that the bend could be comfortably traversed at 73-75 kph. The Court of Appeal held that the evidence did not establish that a reasonable person supervising Miss Sweeney would have instructed her to slow down below 70 kph as she approached the bend. Their Honours therefore found that Justice Fullerton had erred in holding Mr Thornton to have been negligent.

On 9 March 2012 Chief Justice French and Justice Gummow referred this matter into an enlarged bench so that the application for special leave to appeal could be argued as on an appeal.

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

- Whether the Court of Appeal's finding that negligence had not been established was the result of its error as to the statement of, and findings as to:

    a) the content of the duty of care;
    b) breach of duty of care; and
    c) causation,

    in the particular circumstances of the Applicant learner driver's claim against the Respondent supervising driver.

- Whether the Court of Appeal erred in its unjustified limitation of the effect of the Respondent's admission on the content of his duty of care to the Applicant.

COOPER v THE QUEEN (S135/2012)

Court appealed from: New South Wales Court of Criminal Appeal
[2011] NSWCCA 258

Date of judgment: 5 December 2011

Special leave granted: 11 May 2012

On 22 March 2003 Mr Dale Muldoon was murdered in the home of Mr Bradley Cooper and Mr Cooper's partner, Ms Julie-Ann Quinn, after a drunken altercation between the two men. Mr Muldoon had been hit on the head with a metal baseball bat and then with a hatchet. One of the wounds ("the star-shaped wound") on Mr Muldoon's head, which might have caused his death, was probably inflicted by the baseball bat. Another wound, which also might have caused his death, was probably inflicted by the hatchet. A witness to the disposal of Mr Muldoon's body, "C", gave evidence that Ms Quinn had told her that she (Ms Quinn) had struck Mr Muldoon with the hatchet because she feared that he was about to kill Mr Cooper. Ms Quinn was tried separately from Mr Cooper and was acquitted.

Mr Cooper pleaded guilty to a charge of perverting the course of justice (by disposing of Mr Muldoon's body in a forest), but not guilty to murder. In Mr Cooper's trial, his defence was that Ms Quinn had struck Mr Muldoon with the hatchet after he had overpowered Mr Cooper. The prosecution's primary case was that Mr Cooper had struck all blows with both implements. The prosecution's alternative case was that Mr Cooper had been involved in a joint criminal enterprise with Ms Quinn. That alternative case was based upon C's evidence that Ms Quinn had confessed to having hit Mr Muldoon with the hatchet.

On 15 June 2005 a jury found Mr Cooper guilty of murdering Mr Muldoon. On 5 September 2005 Justice Buddin sentenced him to 22 years imprisonment, with a non-parole period of 17 years. In appealing against his conviction, Mr Cooper complained about his counsel's failure to lead evidence of certain mental health service records which indicated that Mr Muldoon suffered from a psychosis which could be exacerbated by the consumption of alcohol and drugs. He also complained about his counsel's failure to cross-examine a certain witness concerning Mr Muldoon's mental health.

On 5 December 2011 the Court of Criminal Appeal (Beazley JA, Hidden & R A Hulme JJ) unanimously dismissed Mr Cooper's appeal. Their Honours held that Justice Buddin's directions to the jury concerning joint criminal enterprise, defence of another and Ms Quinn's alleged confession to C had not been inadequate. The Court of Criminal Appeal found however that Justice Buddin had erred in leaving joint criminal enterprise to the jury as a basis for Mr Cooper's liability for murder. Their Honours also found that there was no reasonable explanation for his counsel's failure to tender medical records of, or to cross-examine concerning, Mr Muldoon's mental health. The Court of Criminal Appeal held however that these shortcomings had not given rise to a miscarriage of justice. This was in light of the evidence indicating that Mr Cooper had struck the blow that caused the star-shaped wound.

The grounds of appeal include:

- The Court of Criminal Appeal erred in applying the proviso to s 6(1) of the *Criminal Appeal Act* 1912 (NSW).

- The Court of Criminal Appeal erred in holding that defence counsel's failure to adduce relevant evidence in relation to the deceased's mental condition and the related failure to cross-examine the deceased's grandmother did not occasion a miscarriage of justice.

ANDREWS & ORS v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (M48/2012)

Court from which cause removed: Full Court of the Federal Court of Australia

Date cause removed: 11 May 2012

The applicants are customers of the respondent bank ("ANZ"), who have been charged a variety of fees for overdrafts, overdrawn accounts, dishonour fees and overlimit credit card accounts ("the exception fees"). They brought a representative proceeding in the Federal Court, on their own behalf and on behalf of approximately 38,000 group members, seeking various forms of relief. The applicants claimed: that each of the exception fees was a penalty and was out of all proportion, or unrelated to, the likely damage sustained by the respondent; that the imposition of the exception fees was unconscionable, in contravention of the *Australian Securities and Investments Commission Act* 2001 (Cth), the *Trade Practices Act* 1974 (Cth) and the *Fair Trading Act* 1999 (Vic) ("the FTA"); that the contracts under which the exception fees were imposed in relation to personal credit card accounts were unjust transactions in contravention of the former *Uniform Consumer Credit Code* and the *National Credit Code*; and that the terms imposing the exception fees in relation to personal saving and transaction accounts and personal credit card accounts were unfair terms, and therefore void, under the FTA.

On 5 May 2011 the primary judge (Gordon J) made orders for the determination of separate questions in relation to seventeen exception fees. The questions were, in substance:

(a) whether the fee was imposed upon the relevant applicant in circumstances where the applicant had committed a breach of his or her contract with the respondent;
(b) alternatively, whether the fee was imposed upon the relevant applicant in circumstances that fell within what the applicants contend is the true scope of the doctrine of penalties; and
(c) in light of the answers to (a) and (b), whether the fee is capable of being characterised as a penalty by reason of that fact.

Gordon J delivered judgment in relation to the separate questions on 5 December 2011. Her Honour found that the doctrine of penalties was limited to circumstances of breach of a contractual obligation, and on the proper construction of the terms and conditions imposed on the applicants by the ANZ, only the late payment fees on personal and business credit card accounts were imposed in circumstances where the applicant had committed a breach of his or her contract with the ANZ and were therefore capable of being characterised as a penalty.

The applicants filed an application for leave to appeal to the Full Court of the Federal Court on 21 December 2011. They sought removal of that application (and, if leave be granted, the appeal) into this Court on the grounds that it raised important issues regarding the true scope of the law of penalties in Australia, which may have significant implications beyond the scope of this proceeding. They noted that the Court of Appeal of New South Wales, in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292 felt constrained by existing authority to limit the doctrine of penalties to circumstances of breach of contract. This view has subsequently been endorsed by the Court of Appeal of Victoria and the Full Court of the Supreme Court of South Australia.

On 11 May 2102 this Court ordered that so much of the cause pending in the Federal Court as concerned the question of the scope of the equitable jurisdiction to relieve against penalties and the question of whether a person can only be relieved against a penalty if it becomes payable for a breach of contract, be removed into this Court.

The issues to be determined by this Court include:

- Whether the ”jurisdiction” in respect of penalties is available only in law or remains alive in equity, and if so, what is its scope and doctrinal basis.

- Whether in law or equity, a party can *only* be relieved against a penalty if it becomes payable for a *breach of contract*, a limitation expressed by the House of Lords in *Export Credit Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205; [1983] 1 WLR 399.

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT NO. IH00AAQS v CROSS (S417/2011)

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT NO. IH00AAQS v THELANDER (S418/2011)

CERTAIN LLOYD'S UNDERWRITERS SUBSCRIBING TO CONTRACT NO. IH00AAQS v THELANDER (S419/2011)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 136

Date of judgments: 1 June 2011

Special leave granted: 9 December 2011

These matters concern the interpretation of legislation that limits legal costs payable by one party to the other in personal injury matters.

Mr John Cross, Mr Mark Thelander and Ms Jill Thelander ("the Respondents") were assaulted by hotel security officers. In the District Court of New South Wales, Judge Garling awarded each of them less than $100,000 in damages for personal injury. On 22 April 2010 his Honour concluded that the legal costs to be awarded to each Respondent would be limited by section 198D of the *Legal Profession Act* 1987 (NSW) ("the 1987 Act") to the greater of $10,000 or 20% of damages.

The phrase "personal injury damages" is defined in both the 1987 Act and the *Legal Profession Act* 2004 (NSW) ("the 2004 Act") as having "the same meaning as in Part 2 of the *Civil Liability Act* 2002 (NSW)" ("the CLA"). Relevantly, section 11 of the CLA defines that phrase as meaning "damages that relate to the death of or injury to a person."

On 1 June 2011 the Court of Appeal (Hodgson & Basten JJA, Sackville AJA) ("the Court") unanimously allowed the Appellant Insurers' appeal. Their Honours found that the Respondents' legal costs were not limited by section 198D of the 1987 Act, or by section 338 of the 2004 Act. They held that the meaning of "personal injury damages" must be construed in accordance with Part 2 of the CLA. They noted that awards of damages where injury resulted from an intentional act (rather than negligence) are largely excluded from the operation of Part 2. The Court found it significant that the definition of "personal injury damages" in both the 1987 Act and the 2004 Act did not refer to the definition in section 11 of the CLA but to Part 2 generally. Their Honours held that such an interpretation was in accordance with the purpose of the CLA, which was the limitation of costs of compulsory insurance for negligence claims.

The grounds of appeal (in each matter) include:

- The Court erred in concluding (at [1], [59], [67] & [79] – [81]) that the Respondent's claim for damages in respect of certain assaults was not a claim for "personal injury damages" within the meaning of either section 198D of the 1987 Act or section 338 of the 2004 Act, and was thus not subject to the costs restrictions contained in those provisions.

- The Court erred in failing to conclude that the expression “personal injury damages” within the relevant provisions of the *Legal Profession Acts* had the same meaning as it has in the CLA, being the meaning given by the definition of the expression contained in that Act.

STATE OF NEW SOUTH WALES v WILLIAMSON (S416/2011)

Court appealed from: New South Wales Court of Appeal
[2011] NSWCA 183

Dates of judgment: 5 July 2011

Special leave granted: 9 December 2011

This matter concerns the interpretation of legislation that limits legal costs payable by one party to the other in personal injury matters.

Mr Jayson Williamson sued for assault, unlawful arrest and false imprisonment after an incident with New South Wales police officers. The matter was settled. The District Court of New South Wales made orders by consent, giving judgment of less than $100,000 plus costs. In the Supreme Court of New South Wales, Justice Hall declared that those costs were not regulated by s 338 of the *Legal Profession Act* 2004 (NSW) ("the 2004 Act").

The State of New South Wales ("the State") sought leave to appeal. On 5 July 2011 the Court of Appeal (Hodgson, Campbell & Macfarlan JJA) unanimously dismissed the State's appeal. Their Honours held that a claim for damages for assault and false imprisonment, where the false imprisonment claim is not severable or negligible, is not a claim for "personal injury damages" within the meaning of s 338 of the 2004 Act. Their Honours found it unnecessary for the judge below to have held that the police officers' assault on Mr Williamson was done with intent to cause injury. Their Honours also rejected the State's submission that a claim for false imprisonment constitutes a claim for personal injury damages where a plaintiff contends that his injuries affected his mental state.

A majority of the Court (Campbell & Macfarlan JJA) however disagreed with the reasoning in *Cross v Certain Lloyd's Underwriters; Thelander v Certain Lloyd's Underwriters* [2011] NSWCA 136 ("*Cross*"). Justices Campbell & Macfarlan held that the costs limitation in s 338 of the 2004 Act would not apply where damages were recovered on a claim based solely on an assault with intent to injure. They found that the phrase "personal injury damages" should be construed, for the costs limitation purpose in s 338, with reference only to s 11 of the *Civil Liability Act* 2002 (NSW) ("the CLA"). The scope of Part 2, as restricted by s 11A (which largely excludes damages for intentional act injuries) should not be considered. Justice Macfarlan stated that the literal meaning of a statute's text must prevail, unless that meaning would give rise to an absurdity, or the text was sufficiently tractable to accommodate a meaning suggested by contextual or policy considerations. Justice Hodgson however agreed with *Cross*.

The grounds of appeal include:

- In considering itself bound by the decision in *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 the New South Wales Court of Appeal erred because that decision is clearly wrong.

DOUGLASS v THE QUEEN (A17/2012)

Court appealed from:	Court of Criminal Appeal of the Supreme Court of South Australia [2011] SASCFC 6
Date of judgment:	4 February 2011
Date special leave granted:	11 May 2012

The appellant was found guilty by a District Court Judge of one count of aggravated indecent assault. The victim was the appellant's granddaughter, who was 3 years old at the time of the offence. The Crown's only evidence of guilt was a video interview with the victim conducted by a psychologist, which was admitted at trial. The appellant gave evidence and denied the incident had occurred.

In his appeal to the Court of Criminal Appeal (Doyle CJ, Anderson and David JJ), the appellant relied on two grounds: that that the verdict was unsafe and unsatisfactory; and the judge failed to give adequate reasons for rejecting the appellant's evidence. On the second ground, the Court considered that, after a trial by judge alone, the judge should state his or her findings on the main grounds upon which the verdict rested, and usually would need to give reasons for making those findings, but it was not necessary for the judge to make reasoned findings on every disputed matter in the case, nor on every legal issue that arose. When a finding or the resolution of a case turned on credibility, it may be enough for the judge to say that the judge believed one witness in preference to another.

In this case, the Judge did not explain how and why he came to the conclusion that he could and should reject the denials by the appellant, and make a finding of guilt beyond reasonable doubt. However, the Court thought the explanation was obvious. Having considered the evidence as a whole, and being satisfied of the truth and reliability of the victim's evidence, the Judge necessarily rejected the denials by the appellant. It was therefore not necessary for the Judge to spell out why he rejected the appellant's denials. Indeed, there was little he could say other than that because he accepted and acted on the evidence of the victim, he necessarily rejected the evidence of the appellant. This was not a case in which the failure to explain why the Judge rejected the evidence of the appellant left the court of appeal unable properly to consider the appeal. There could be no doubt about how and why the Judge rejected the defence case.

In relation to the first ground, the Court rejected the contention that, because there was no inherent flaw in the evidence of the appellant, and because there was nothing in his demeanour that assisted the prosecution, the Judge could not, having considered the evidence on both sides, accept the victim's evidence and make a finding of guilt beyond reasonable doubt. The Court considered that there was evidence that the Judge was entitled to accept and to rely upon, to reach a finding of guilt beyond reasonable doubt. The evidence did not suffer from weaknesses that meant that the judge should have had a reasonable doubt.

The grounds of appeal include:

- The Court of Criminal Appeal erred in holding that, in the absence of an adverse finding in relation to the appellant's sworn evidence, the trial judge must have rejected his evidence and rejected it beyond reasonable doubt.

- The Court of Criminal Appeal erred in failing to find that the verdict of guilty was unsafe in that it erred in considering that this was a case of "word against word".