SHORT PARTICULARS OF CASES
APPEALS

JUNE 2020

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LEWIS v THE AUSTRALIAN CAPITAL TERRITORY (C14/2019)

Court appealed from: Court of Appeal, Supreme Court of the Australian Capital Territory
[2019] ACTCA 16

Date of judgment: 24 June 2019

Special leave granted: 16 October 2019

On 24 January 2008, having pleaded guilty to an offence of recklessly or intentionally inflicting actual bodily harm, the appellant was sentenced in the Magistrates Court of the ACT to 12 months' imprisonment to be served by periodic detention under Ch 5 of the *Crimes (Sentence Administration) Act 2005* (ACT) ("the Act"). During the term of his periodic detention the appellant failed to attend on several of the weekends when he should have presented himself at prison. On 8 July 2008, at a meeting to which the appellant was invited but did not attend, the Sentence Administration Board ("the Board") cancelled the periodic detention order. The appellant was arrested on 5 January 2009 and imprisoned for 82 days until 27 March 2009, when he was granted bail.

The appellant challenged the validity of the decision of the Board to cancel the periodic detention order. The challenge was heard in the Supreme Court of the ACT in 2009. In a judgment delivered on 1 October 2013 the primary judge entered judgment for the appellant, concluding that the decision of the Board was invalid as the appellant had not been given an opportunity to decide whether or not to attend before the Board.

The appellant subsequently sought damages for false imprisonment arising from the 82 days' imprisonment. The claim was heard in February 2016. In a judgment delivered in February 2018 the primary judge held that the decision of the Board was a nullity and that the 82 days' imprisonment was unlawful. The primary judge further held that despite the false imprisonment of the appellant he was entitled only to nominal damages of $1. This was because the appellant was always going to serve the 82 days in prison as the Board was required by s 66(4), s 69(1) and s 69(2) of the Act to cancel the periodic detention order as a result of the appellant's failure to comply with his periodic detention obligations.

The appellant appealed the award of nominal damages. The Court of Appeal upheld the award of nominal damages and dismissed the appeal with costs. The Court of Appeal held that but for the *invalid* decision of the Board of 8 July 2008, it was inevitable that the appellant's periodic detention would have been *validly* cancelled by the Board under s 68 of the Act (as required by s 69(2) of the Act) by reason of his absence from period detention on 10 occasions, and that he would therefore have been *lawfully* imprisoned for the whole of the time that he had in fact been *unlawfully* imprisoned. In these circumstances the appellant was not entitled to any substantial damages by way of compensation for false imprisonment.

The Court of Appeal also rejected the appellant's alternative claim for "vindicatory damages", on the basis that even if there were a basis for such an award of damages in Australian law, such damages should not be awarded to the appellant.

The Commonwealth has been granted leave to intervene in the appeal.

The grounds of appeal include:

- The Court of Appeal erred in concluding that, because the appellant would have been lawfully imprisoned if he had not been unlawfully imprisoned, he was not entitled to damages to compensate him for false imprisonment.

- Alternatively, the Court of Appeal erred in concluding that the appellant was not entitled to vindicatory damages.

BERRY & ANOR v CCL SECURE PTY LTD (S315/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 81 & [2019] FCAFC 92

Date of judgment: 24 May 2019 & 4 June 2019

Special leave granted: 18 October 2019

CCL Secure Pty Ltd ("Securency") was the manufacturer and designer of polymer technology, which included polymer banknotes. In association with the Reserve Bank of Australia, Securency had been attempting, as early as 1999, to obtain an order to produce such banknotes from the Central Bank of Nigeria.

Dr Benoy Berry was a director and shareholder of Global Secure Currency Limited ("GSC"), with substantial business experience in Nigeria. In 2003 he began working on behalf of Securency in respect of its proposed Nigerian venture. To begin with, Dr Berry had no formal contract with Securency. That changed around August 2006 when the parties executed an agency agreement. A slightly revised version of that agreement ("the Agency Agreement") was then re-executed around March 2007 and it is this version which is presently relevant.

The 2006 decision by the Nigerian Government to convert its first banknotes to polymer proved to be immensely profitable to Securency. Dr Berry and GSC were instrumental in helping to secure this outcome.

On 24 February 2008 Dr Berry was tricked by one of Securency's employees, Mr Peter Chapman, into signing a letter terminating the Agency Agreement ("the Termination Letter"). The relevant deception was that by signing the Termination Letter, Dr Berry and GSC would be protected by the existing terms and that the parties would make a new agreement on those same terms. Mr Chapman then positioned companies in which he had an interest to act as Securency's new agents in Nigeria. A further Securency employee was also involved in this fraud.

In May 2009 a public scandal broke over Securency's bribery of foreign government officials in order to secure orders for polymer banknotes. In September 2009 this led to Dr Berry and GSC writing to Securency and making a demand for payment of his fees and commissions. In July/August 2010 Securency terminated all agency agreements ("the 2010 Policy Decision").

The central issue within section 82 of the *Trade Practices Act 1974* (Cth) ("TPA") was to identify, then measure, the loss suffered by Dr Berry and GSC by the contravening conduct.

Justice Rares awarded almost $65 million in favour of Dr Berry and GSC. It is common ground that that award was one of statutory compensation following a finding of misleading or deceptive conduct contrary to the provisions of s 52 of the TPA. In calculating the damages payable, his Honour looked at the commission payable under the Agency Agreement in two stages:

a) For the period from February 2008 until the 2010 Policy Decision; and

b) For the period thereafter.

The Full Federal Court (McKerracher, Robertson & Lee JJ) varied Justice Rares' 2008-2010 assessment. Their Honours found that, on the balance of probabilities, Securency would have exercised its right to terminate the Agency Agreement on 1 June 2008 (to be effective from 30 June 2008). They also set aside Justice Rares' post 2010 assessment on the basis that Dr Berry did not have a "chance of survival" after the 2010 Policy Decision.

The grounds of appeal include:

- The FFC erred at *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 [209] – [228] in finding appellable error in Justice Rares' finding at *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 [311] – [322] that damages were to be assessed pursuant to 82 of the TPA, in the period from 24 February 2008 up till late 2010, on the basis that Securency, as a person guilty of misleading or deceptive conduct and fraud, could not be heard to say that there was a lawful means by which it could have inflicted the same harm on the Appellants being means which Securency chose not to take at the time.

On 8 November 2019 a notice of contention was filed, the grounds of which include:

- The FFC erred at *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 [149] in failing to decide the issue raised by ground 12 of the appeal to that Court, namely that Dr Berry's dispute with the Nigerian Government did have a negative effect on his ability to perform his contractual obligations under the Agency Agreement.

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v CED16 & ANOR (S347/2019)

Court appealed from: Federal Court of Australia
[2018] FCA 1451 & [2019] FCA 438

Date of judgment: 25 September 2018 & 3 April 2019

Special leave granted: 13 December 2019

The First Respondent is a Sri Lankan citizen of Tamil ethnicity. He arrived on Christmas Island in September 2012, having departed illegally from Sri Lanka the month before. On 4 September 2015 the First Respondent applied for a Safe Haven Enterprise Visa ("Safe Haven visa"), an application which was refused by the Appellant's delegate on 19 May 2016. The matter was then both automatically and immediately referred to the Immigration Assessment Authority ("IAA") for review. On that same day, the Appellant purportedly certified under s 473GB of the Act ("the Certificate") that the disclosure of information in the Identity Assessment Form could form the basis for a claim of Public Interest Immunity by the Crown. This was because it, the Identity Assessment Form, was a working document.

In July 2016 the IAA affirmed the decision of the delegate to refuse to grant the First Respondent a Safe Haven visa, while the Federal Circuit Court dismissed an application for judicial review of that decision in February 2017.

The subsequent appeal raised a question concerning the correct interpretation of certain provisions of Part 7AA of the *Migration Act 1958* (Cth) ("the Act"). In particular the appeal raised the scope of the IAA's obligation to give a visa applicant the particulars of "new information" that it intends to consider in reviewing the delegate's decision. It also raised the issue of how the IAA is to deal with information contained in a certificate issued pursuant to s 473GB of the Act, but where the certificate itself is invalid.

On 3 April 2019 Justice Derrington issued a writ of certiorari directed to the IAA, quashing its decision. His Honour also issued a writ of mandamus, directed to the IAA, commanding it to exercise its jurisdiction according to law. His Honour noted that the invalid Certificate was considered to be relevant by the IAA and that it was also relied upon. It was also apparently relevant to the decision made by the IAA. The Certificate was therefore "new information" which required the IAA to disclose its existence to the First Respondent. (There would have been no such obligation upon the IAA if it had it been considered "review information".) As no such notification was given, that failure amounted to a jurisdictional error.

The grounds of appeal include:

- The Federal Court erred in holding that the primary judge made an appealable error by failing to hold that a certificate issued by the Minister for Immigration and Border Protection purportedly pursuant to section 473GB(5) of the Act comprised "new information" as defined in section 473DC(1) of the Act.

- The Federal Court ought to have held that the Certificate was not "new information" as it did not satisfy the requirements of section 473DC(1) of the Act.

STATE OF QUEENSLAND v THE ESTATE OF THE LATE JENNIFER LEANNE MASSON (B63/2019)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2019] QCA 80

Date of judgment: 10 May 2019

Special leave granted: 15 November 2019

On 21 July 2002 Ms Jennifer Masson, who suffered from severe asthma, collapsed and went into respiratory arrest. Officers of the Queensland Ambulance Service ("QAS") attended the scene six minutes after receiving a call from a friend of Ms Masson's. The ambulance officers, led by Mr Clinton Peters, were immediately informed that Ms Masson had a history of severe asthma. Ms Masson was observed to be unconscious and to have high blood pressure, a very high heart rate and almost non-existent respiration.

One minute after arriving, Mr Peters administered salbutamol (a drug used to dilate the bronchial passages in the lungs, commonly used in the treatment of asthma) to Ms Masson intravenously. Ms Masson's condition initially improved and she was placed in an ambulance for transportation to hospital. After departure however Ms Masson's condition deteriorated. Her heart rate slowed and she became close to suffering cardiac arrest. Mr Peters then administered adrenaline. (This was in addition to other measures that were taken by Mr Peters and other officers throughout their treatment of Ms Masson. One of the common uses of adrenaline is the dilation of the bronchial passages after a severe asthma attack.) At the hospital, where adrenaline was again administered to her, Ms Masson was profoundly unconscious and she suffered severe brain damage due to a lack of oxygen. Ms Masson never regained consciousness and in February 2016 she died.

While she was still alive, Ms Masson sued the Appellant in negligence (in proceedings that were continued by Ms Masson's estate after her death). Ms Masson contended that the oxygen deprivation which caused her brain damage occurred because of the QAS officers' failure to administer adrenaline during the initial phase of their treatment of her. She argued that the QAS officers fell short of their duty of care because the asthma treatment flowchart in the QAS Clinical Practice Manual ("CPM") required the administration of adrenaline during the initial treatment of a person who was unconscious and at risk of imminent respiratory arrest after an asthma attack. The Appellant contended however that Mr Peters' choice of salbutamol was reasonable because salbutamol was an effective bronchodilator and, given Ms Masson's high heart rate and blood pressure, it was preferable to adrenaline because it did not carry the same risk of worsening Ms Masson's condition by further increasing her heart rate (although a side effect of salbutamol, too, is a rapid heart rate).

On 23 July 2018 Justice Henry dismissed Ms Masson's claim. On causation, his Honour found it more likely than not that if Mr Peters had first administered adrenaline instead of salbutamol then Ms Masson's severe brain damage would have been avoided. (This was in view of two previous occasions, unknown to Mr Peters, where Ms Masson had recovered from a severe asthma attack after being given adrenaline.) Justice Henry also found however that Mr Peters had duly *considered* the use of adrenaline in accordance with the CPM and that the choice to use salbutamol in the initial phase of treatment was sound, since it was supported

by a body of medical opinion (although there was also a body of medical opinion to the contrary). The standard of care required of ambulance officers therefore had been met and the alleged breach of the duty of care owed vicariously by the Appellant could not be made out.

An appeal by Ms Masson's estate was unanimously allowed by the Court of Appeal (Fraser and McMurdo JJA and Boddice J), which awarded damages and interest of $3,179,384.00. Their Honours held that Justice Henry had correctly interpreted the CPM's requirement that ambulance officers *consider* the use of adrenaline. The Court of Appeal found however that the evidence did not support the finding that Mr Peters had considered adrenaline and made a clinical decision not to administer it. Rather, Mr Peters had testified that the CPM *required* him to administer salbutamol. Their Honours found that the CPM made it sufficiently clear that adrenaline was the preferred drug for a rapid dilution of the bronchial passages. Ms Masson therefore was not treated in accordance with the CPM, which amounted to a failure by Mr Peters to exercise the reasonable care expected of an ambulance officer. The Court of Appeal also found that the evidence did not support Justice Henry's finding that there was a body of medical opinion to support the administration of salbutamol to a patient with Ms Masson's high heart rate and blood pressure. Their Honours held that the Appellant was vicariously liable for Mr Peters' negligence in failing to administer adrenaline to Ms Masson during the initial phase of treatment.

The grounds of appeal include:

- The Court of Appeal erred in overturning the trial judge's conclusions (to the effect that the attending ambulance service officer, Mr Peters, had considered the administration of adrenaline in accordance with the CPM) and in finding that Mr Peters had not done so or done so properly (Court of Appeal reasons [151], [153], [154]) when there was no proper basis to do so on the evidence and, in particular, the trial judge's findings were not glaringly improbable, or contrary to compelling inferences or otherwise properly to be set aside on appeal.

- Further, the Court of Appeal erred in holding that to the extent Mr Peters did advert to the use of adrenaline, he immediately rejected it, not because of a clinical judgment, but because he misunderstood the guideline by thinking that in no case was adrenaline to be given to a patient who was not bradycardic (Court of Appeal reasons [151]) when that was contrary to the findings of the trial judge, the trial judge's findings were not glaringly improbable, or contrary to compelling inferences or otherwise properly to be set aside on appeal, and there was no evidence to support the Court of Appeal's conclusion.