Court of Appeal
Supreme Court
Sydney

Decisions of Interest

26 June 2024 – 10 July 2024

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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New South Wales Court of Appeal Decisions of Interest

Negligence: Breach

***Hornsby Shire Council v Salman* [2024] NSWCA 155**

Decision date: 27 June 2024

White and Adamson JJA, Basten AJA

On 28 February 2021, Kathie Salman attended Lessing Park and when walking towards the swings, rolled her ankles and fell as she stepped from the mulch area to the wet pour area. Hornsby Shire Council (Council) is responsible for the care, management and maintenance of Lessing Park in Hornsby.

Ms Salman alleged that the Council breached its duty of care by failing to ensure that the level of mulch did not fall below the level of the wet pour area. Ms Salman tendered an expert report, which opined that the mulch area "was not maintained correctly in accordance with the Australian Standards, creating potential trip/fall hazards". Ms Salman also tendered two inspection reports of the park in 2020 (Playfix Reports), which stated that the mulch was low and "need[ed] to be built up to the level of the wet pour rubber to eliminate any trip points".

The primary judge found the Council had breached its duty of care, causing Ms Salman suffer injuries and ordered the Council pay $283,200 in damages.

The Court held (White JA and Adamson JA agreeing, Basten AJA in dissent), dismissing the appeal with costs:

- The primary judge did not err in identifying the risk of harm nor the application of safety standards:[12] (White JA), [101]-[103] (Adamson JA).
- It was open to the primary judge to find that the risk was not obvious, considering that it was foreseeable that pedestrians approaching the playground would be focussed on a child: [113]-[115] (Adamson JA).
- The risk which ensued was not so divorced from the risk of tripping addressed in the Playfix reports as to breach the causal chain: [122] (Adamson JA).
- A reasonable person in the position of the Council would have acted on the advice contained in the Playfix reports: [23]-[24] (White JA). Had the Council done what was advised, they would have reduced the risk of "tripping" in the narrow sense but also would have reduced the risk of harm identified by the primary judge: [123]-[128] (Adamson JA).
- The fact of the change in surface was obvious. Users taking reasonable care for their own safety could not have failed to realise that the nature of the surface was changing and that the new surface was at a higher level: [157] (Basten AJA in dissent).

Contract: Construction

***Touma v Highfields Australia Pty Ltd* [2024] NSWCA 160**

Decision date: 04 July 2024

White and Adamson JJA and Basten AJA

In 2016, Advanced Motor Dealers Group Pty Ltd (AMDG) through its general manager, Joseph Touma, entered an arrangement with Highfields Australia Pty Ltd (Highfields), whereby Highfields arranged for the refinancing of four luxury cars owned by AMDG. Highfields secured financing, which required Highfields to provide security over the vehicles, and personal guarantees from its directors, including Alan Balout.

AMDG maintained control of the four vehicles and licensed them out to a related entity, Ultimate Drive Days Pty Ltd (UDD), whose business was to rent luxury cars. UDD would pay AMDG a fee for the licence, and AMDG was responsible for paying any fees or costs associated with the vehicles, including loan repayments to the financiers.

In 2020, AMDG was placed into receivership and on 4 December 2020, Highfields commenced proceedings in the Equity Division seeking, inter alia, a declaration that it owned the four vehicles subject to the 2016 arrangements and orders for delivery of the vehicles to it. The primary judge found in Highfields' favour and made a declaration that Highfields was the owner of the vehicles. Mr Touma filed a notice of appeal.

The Court held (Basten AJA, White and Adamson JJA), dismissing the appeal with costs:

- The primary judge was correct to find four separate oral agreements, noting the documentary records of the sales and refinancing held significant weight in reaching that finding: [17]-[19].
- Mr Touma's argument that the financial statements of AMDG demonstrated its ownership of the vehicles, as, viewed in context, those statements were correctly determined to carry little weight: [40]-[41].
- Any "admissions" made by Mr Balout in cross-examination as to AMDG's financial records held little weight as they were not made on behalf of Highfields and were inconsistent with the contemporaneous transaction documents: [43]-[47].
- There was no uncommerciality in Mr Balout's account of the agreements. It was unlikely that Highfield would have taken on the risks of refinancing without recourse to the assets in the event AMDG defaulted in meeting the repayments: [50]-[51].

Professional and Trades: Health Practitioners

***Reimers v Medical Board of Australia* [2024] NSWCA 164**

Decision date: 10 July 2024

Leeming and Kirk JJA, Griffiths AJA

Dr Gerrit Reimers was registered as a specialist anaesthetist until his name was removed from the Register of Medical Practitioners in 2003, following proven complaints that he had self-administered opioids. That deregistration was the result of a decision by the Medical Tribunal of New South Wales which found Dr Reimers guilty of professional misconduct.

In 2018, NCAT reinstated Dr Reimers' general registration but in 2023, he also sought reinstatement of specialist registration for anaesthesia. That application was refused by the Medical Board of Australia, and on appeal, by NCAT. The issue was whether Dr Reimers was a "suitable person" for registration under section 55 of the *Health Practitioners Regulation National Law 2009* (NSW) (National Law), and therefore was capable of being an "eligible person" for specialist registration.

The Court held (Leeming JA, Kirk JA and Griffiths AJA agreeing), dismissing the appeal with costs:

- The Tribunal erred by conflating some of the questions posed by the National Law. However, that conflation did not involve a material error, as the Tribunal indicated that it reached the same conclusion on an independent basis, under s 55(1)(h)(ii), which was not beset by legal error: [74],[84].
- Sections 55(1)(f) and 55(1)(h) are directed to different questions. There is no basis for excluding a consideration of recency from s 55(1)(h) merely because a standard which did not apply to the special circumstances attending Dr Reimers' unusual registration addressed recency: [95].
- It was open to NCAT to consider that Dr Reimers, who had not practised at all for two decades and had given no explanation for that and no account of the training and supervision which he would be subject to if he were permitted to practise on some restricted basis, was unable to practise competently and safely: [102]-[103].
- Consideration of the nature of the Medical Board of Australia and of its various committees, which are also styled as 'Boards', and of the role of interpretative provisions insisting that bodies corporate purportedly constituted under each State's adoption of a uniform National Law are in fact a single national entity: [38]-[50].

Australian Intermediate Appellate Decision of Interest

Tort: Practice and Procedure

***Saffari v State of Western Australia* [2024] WASCA 77**

Decision date: 28 June 2024

Mitchell JA, Tottle and Seaward JJ

On 29 December 2019, Shahriar Saffari, commenced proceedings by writ of summons indorsed with a statement of claim. Mr Saffari's action concerned a prosecution commenced (and later discontinued) against him by police officer, Daniel Talbot, and the provision by the Western Australian Police Force of allegedly inaccurate information to various organisations including the Australian Federal Police and the Commonwealth Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

This appeal concerned an application to remove the former Commissioner of Police, Chris Dawson, as a party pursuant to O 18 r 6(2)(a) of the *Rules of the Supreme Court 1971* (WA) (RSC). The primary judge granted the application to remove Mr Dawson as a defendant.

The Court held (Mitchell JA, Tottle and Seaward JJ agreeing), allowing the appeal:

- Mr Dawson should not have been removed as a defendant at an interlocutory stage in the proceedings: [51].
- The primary judge erred in granting the application to remove Mr Dawson as a party, at an interlocutory stage of the proceedings and in circumstances where there had been no findings of fact and the scope of the relevant legislation had not been the subject of judicial determination: [38].
- The real issue raised by this appeal is not whether the primary judge made an error of fact, but rather the proper construction of s 137 of the *Police Act 1982* (WA) (Police Act); whether s 137(3) and s 137(5)(a) of the Police Act apply to the specific pleaded actions of Mr Dawson; and whether these issues should be resolved at the interlocutory stage of this particular action: [41].
- The underlying issues regarding the scope of s 137(3) and s 137(5)(a) of the Police Act should be determined at trial on the evidence and following full argument as to the facts and the law. Nothing in these reasons should be taken as suggesting any particular answer to the questions of construction and the application to the pleaded case: [45]-[49].

Asia Pacific Decision of Interest

Tort: Causation

Crapper Ian Anthony v Salmizan bin Abdullah **[2024] SGCA 21**

Decision date: 28 June 2024

Menon CJ, Chong JA, Ling J

On 29 March 2019, Anthony Ian Crapper was driving a motorcycle when it collided with Abdullah bin Salmizan's motor car. Mr Salmizan allegedly suffered neck pain and back pain because of the accident and filed a claim against Mr Crapper for general damages and special damages (including loss of income, medical expenses and transport expenses). Mr Crapper contested Mr Salmizan's claim, claiming a lack of causation for his injuries and challenged Mr Salmizan's heads of claims for general damages.

To save time and costs, Mr Crapper and Mr Salmizan agreed to enter a consent interlocutory judgment at 90 per cent in favour of Mr Salmizan but "leaving the issues of damages and causation to be assessed". Mr Crapper applied for the case to be transferred to the General Division of the High Court to determine if it is permissible to dispute causation to any extent after the entering of interlocutory judgment. The High Court judge below determined that parties could not reserve the issue of causation to the subsequent stage of the proceedings. Mr Crapper was granted permission to appeal the High Court's decision.

The Court held (Chong JA, Menon CJ and Ling J agreeing), allowing the appeal:

- The judge below erroneously approached this question, with reference to cases where the court in contested negligence claims found causation before the entering of interlocutory judgment, or to cases where the court had entered interlocutory judgment in default.
- In a negligence claim where an interlocutory judgment had been entered in default, it would be one in which liability (and therefore causation of damage) was not challenged before the assessment of damages. However, that does not mean that causation must invariably either be admitted or decided in every case before entering interlocutory judgment.
- The question assumes that an interlocutory judgment on terms, which include an express reservation on causation, had been entered by consent. In any consent interlocutory judgment, it is for the parties to agree on what issues had been resolved with *res judicata* effect and what issues had been left open.
- The court can and may order bifurcation of proceedings, wherein liability had not been established at the first stage of the proceedings but where an interlocutory judgment had nonetheless been entered. It was not necessary for the court to deal with the conceptual points on the law of negligence which were raised by the judge below.

International Decision of Interest

Presidential Immunity

***Trump v United States* 603 U.S. ___ (2024)**

Decision date: 1 July 2024

Roberts CJ, Alito, Gorsuch, Kavanaugh, Barrett, Thomas, Sotomayor, Kagan, Jackson JJ

A federal grand jury indicted the former President (Mr Trump) on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Mr Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results.

Mr Trump moved to dismiss the indictment based on Presidential immunity, arguing that a President has absolute immunity from criminal prosecution for actions performed within the outer perimeter of his official responsibilities, and that the indictment's allegations fell within the core of his official duties.

The District Court denied Mr Trump's motion to dismiss, holding that former Presidents do not possess federal criminal immunity for any acts. The DC Circuit affirmed. Both the District Court and the DC Circuit declined to decide whether the indicted conduct involved official acts.

The Court held (Roberts CJ, Thomas, Alito, Gorsuch, Kavanaugh and Barrett JJ agreeing, Sotomayor J, Kagan and Jackson JJ dissenting), vacating the Court of Appeals for the DC Circuit's judgment and remanding the case for further proceedings:

- Under the US constitutional structure of separated powers, the nature of Presidential power entitles a former President to absolute immunity from criminal prosecution for actions within his conclusive and preclusive constitutional authority: pp 5-6.
- Mr Trump is entitled to at least presumptive immunity from prosecution for all his official acts: pp 5-15.
- Presiding over the January 6 certification proceeding at which Members of Congress count the electoral votes is a constitutional and statutory duty of the Vice President. Additionally, Mr Trump's Tweets and public communications are likely to fall comfortably within the outer perimeter of his official responsibilities as President: pp 23-29.
- The majority endorsed an expansive vision of Presidential immunity for which this new official act immunity now lies for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the nation: pp 10, 29 (Sotomayor J in dissent).