

# Andrew Yuile's High Court Judgements



## TORT

### Limitation of actions – Vicarious liability

In *Prince Alfred College Incorporated v ADC* [2016] HCA 37 (5 October 2016) the respondent had been abused by a housemaster at Prince Alfred College (PAC) in 1962. The respondent brought proceedings in tort, for breach of non-delegable duty of care; negligence and breach of duty of care; and vicarious liability. The respondent also required an extension of time. The trial judge held that an extension should not be granted, but also decided questions of liability. The Court of Appeal granted the extension of time and found that the PAC was vicariously liable. The High Court held that the extension of time should not have been granted as a trial would not be fair to PAC. Significant witnesses had died and evidence had been destroyed. The Court also took into account that the respondent reneged on a deal made earlier between PAC and the respondent to lay the dispute to rest. Although the Court said that the trial judge should not have considered liability, it did comment on some claims to clarify the state of the law. In relation to non-delegable duty, the Court reaffirmed its decision in *New South Wales v Lepore* (2003) 212 CLR 511. The Court also held that it is possible for vicarious liability to arise in relation to a wrongful act that is a criminal offence. But it is not sufficient only for employment to provide an opportunity for commission of a wrongful act. Any special role the employer has assigned to the employee, and the position of the employee and the victim are relevant. Particular features of authority, power, trust, control and an ability to achieve intimacy should be considered. In this case, it was not possible to reach a conclusion about those matters because of the lack of evidence before the Court. French CJ, Kiefel, Bell, Keane and Nettle JJ jointly; Gageler and Gordon JJ concurring separately. Appeal from the Full Court of the Supreme Court (SA) allowed.

## DISCRIMINATION

### Disability discrimination – Juries and jurors

In *Lyons v Queensland* [2016] HCA 38 (5 October 2016) the High Court held that a deputy registrar of the Queensland Supreme Court did not unlawfully discriminate against the appellant, a deaf woman, by excluding her from a list of prospective jurors. The appellant would have needed an Auslan interpreter in court and for the jury deliberations. She argued that to exclude her was directly and indirectly discriminatory. The Court noted that the common law requires that juries be kept separate and that the presence of a non-juror in jury deliberations is an incurable irregularity. There was no basis in the statute to alter that position for an Auslan interpreter. Further, there was no

basis in statute to administer an oath to an interpreter assisting a juror. A prohibition on seeking disclosure jury deliberations in the *Jury Act* would also not apply to an Auslan interpreter. The Court held that Queensland law did not allow for an interpreter to assist the appellant, and she was therefore incapable of performing the functions of a juror. The deputy registrar was required to exclude the appellant from the jury panel. That did not infringe the prohibition on unlawful discrimination. French CJ, Bell, Keane and Nettle JJ jointly; Gageler J separately concurring. Appeal from the Supreme Court (Qld) dismissed.

## REAL PROPERTY

### Bodies corporate – Disputes over common property

In *Ainsworth v Albrecht* [2016] HCA 40 (12 October 2016) the respondent sought an adjustment of common property in a community title scheme. The adjustment would give him exclusive rights over a portion of common property. Approval of such a proposal required a resolution without dissent from the body corporate. At a body corporate meeting, votes were split on the proposal. The respondent then applied to an adjudicator under the *Body Corporate and Community Management Act 1997* (Q). The adjudicator could make an order deeming the proposal to have been passed if the opposition to the proposal was unreasonable in the circumstances. In this case, the adjudicator made such an order. The Queensland Civil and Administrative Tribunal (QCAT) overturned the decision, finding that the adjudicator had impermissibly substituted her own opinion for that of the body corporate, rather than considering whether the grounds of opposition were reasonable. The Court of Appeal set aside the QCAT's decision. The High Court held that the adjudicator had misunderstood her function. The question was not whether the body corporate had acted reasonably, but whether the grounds of opposition of any dissentients were reasonable. It was not part of the adjudicator's role to strike a reasonable balance between competing positions. The grounds of opposition to the proposal raised questions about which reasonable minds could differ. Opposition to the proposal therefore could not be unreasonable. French CJ, Bell, Keane and Gordon JJ jointly; Nettle J concurring separately. Appeal from the Supreme Court (Qld) allowed.

## CONSTITUTIONAL LAW

### Acquisition of property – Allowances and benefits for former parliamentarians

In *Cunningham & Ors v Commonwealth of Australia & Anor* [2016] HCA 39 (12 October 2016) the High Court held that determinations and laws reducing entitlements to former members of the federal parliament were not acquisitions of property on other than just terms. The *Parliamentary Contributory Superannuation Act 1948* (Cth) provides for the payment of 'retiring allowances' to retired members of parliament. Before 2011, this was done by reference to fixed percentages of parliamentary allowances. Since 2011, the Remuneration Tribunal has had power over parts of the calculation of retiring allowances. By way of determinations, the Tribunal changed the method of calculation to effectively reduce the allowances. In addition, some retired parliamentarians received a 'Life Gold Pass', which originally entitled them to free domestic travel. That entitlement was originally a non-statutory entitlement, but from 2002 was provided under the *Members of Parliament (Life Gold Pass) Act 2002* (Cth). That Act also capped the amount of travel that would be provided free. The plaintiffs argued that the two Acts and the Determinations were invalid because they acquired property otherwise than on just terms. The Court held that the retiring allowance amendments were not laws with respect to the acquisition of property. They did not remove the entitlement to an allowance, but altered the method of calculation. Further, the retiring allowances were statutory rights which, having regard to their character, and the context and purpose of the statute creating them, were inherently variable. Where a statutory right or entitlement has always been liable to variation, a variation later effected cannot properly be described as an acquisition of property. The Life Gold Pass entitlements fell into the same category. French CJ, Kiefel and Bell JJ jointly; Gageler J separately concurring in relation to the retirement allowances and dissenting in relation to the Life Gold Pass; Keane J, Nettle J and Gordon J each separately concurring. Answers to Special Case given.

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