Andrew Yuile's High Court Judgments

AUGUST

TENDENCY EVIDENCE

Similarity of facts – 'significant probative value'

In *Hughes v The Queen* [2017] HCA 20 (14 June 2017) the appellant was convicted of nine counts of sexual offences against five underage girls. A part of the case against the appellant was evidence said to show a tendency that the appellant had a sexual interest in females under 16, used his social and familial relationships to get access to children, and engaged in conduct including sexual activity in the vicinity of another adult. Under the *Evidence Act 1995* (NSW), tendency evidence is to be excluded unless the court thinks it has 'significant probative value'. The trial judge allowed the evidence in; the Court of Appeal dismissed an appeal. The appellant argued, relying on *Velkoski v The Queen* (2014) 45 VR 680, that tendency evidence needs to have sufficient common or similar features with the conduct in ahe charge in issue before it will have significant probative value. The High Court rejected that approach. The Court held, by majority, that the admission of tendency evidence is not conditioned upon the Court's assessment of similarity between the evidence and the conduct in issue, though the probative value of such evidence will often depend on similarity. Where the occurrence of the offence charged is in issue, the assessment of probative value includes two considerations: whether the evidence supports proof of a tendency; and the extent to which the tendency supports the proof of a fact that makes up the offence charged. The majority held that the tendency evidence in this case did have significant probative value because, when considered with other evidence, it tended to show that the appellant engaged opportunistically in sexual acts with underage girls, notwithstanding the evident risks of detection. That evidence was capable of removing doubt about the appellant's conduct. Kiefel CJ, Bell, Keane, and Edelman JJ jointly; Gageler J, Nettle J and Gordon J separately dissenting. Appeal from the Court of Appeal (NSW) dismissed.

TRADE PRACTICES

Price fixing – 'market in Australia

In *Air New Zealand v Australian Competition and Consumer Commission; PT Garuda Indonesia v Australian Competition and Consumer Commission* [2017] HCA 21 (14 June 2017) the High Court held that air cargo services provided by the appellants, in relation to which price fixing was alleged, took place in a market in Australia. The Australian Competition and Consumer Commission alleged that airlines had entered into understandings for the imposition of fees and surcharges associated with carriage of goods from Hong Kong, Singapore and Indonesia to Australia. The trial judge found the understandings to exist, and to have had the purpose, effect or likely effect of substantially lessening competition for the purposes of s 45(2) of the *Trade Practices Act 1974* (Cth) (TPA). However, to breach the TPA, the actions had to lessen competition in a market "in Australia", and the trial judge held that requirement not to be satisfied. That finding was overturned on appeal. Whether there was a market in Australia for the air cargo services in issue was the key question for the High Court. The Court unanimously held that there was such a market. The plurality held that a market is a "notional facility which accommodates rivalrous behaviour involving sellers and buyers." The location of a market is to be approached as a practical matter of business. The place where the decision to use a particular carrier is taken may have significance, but will not necessarily be determinative. It is the substitutability of services as the driver of the rivalry between competitors to which the TPA looks. The place of the interplay of supply and demand, driven by the conditions of substitutability, is important. In this case, as the services were for the transport of goods to Australia, as a matter of commerce, the geographical dimension of the market could include Australia. Further, Australia was not just the end of the line, but customers in Australia were a substantial and vital source of demand for the shippers' services, and shippers competed for that custom. The interplay of supply and demand forces thus encompassed Australia. Two further issues arose in the case. Gordon J, with whom the plurality agreed, held that foreign law did not require or compel the airlines to enter into the understandings; and rejected an argument that there was an inconsistency between the TPA and an international Air Services Agreement. Kiefel CJ, Bell and Keane JJ jointly; Nettle J and Gordon J separately concurring. Appeal from the Full Federal Court dismissed.

TORT

Negligence – Duty of care of the State – Revocation of special leave

New South Wales v DC [2017] HCA 22 (14 May 2017) concerned two sisters who had been subjected to sustained abuse by their stepfather for many years. In 1983, one of the sisters complained to the NSW Department of Youth and Community Services. Under the now repealed *Child Welfare Act 1939* (NSW), the Director of the Department was required to take action as he believed appropriate, which might include reporting matters to police. In this case, the Department took some action, but did not report the complaint to police. In 2008, one of the sisters brought an action in negligence against NSW for not reporting the matter, claiming damages for abuse after the complaint. The trial judge held that the Department owed the sisters a duty of care and had breached that duty by failing to notify police. However, the trial judge was not satisfied that the stepfather had continued to abuse the sisters after the complaint. The Court of Appeal held that the abuse had continued, that the Department owed a duty and that the duty had been breached. When special leave was granted, the State did not dispute that a duty of care was owed, but questioned the scope of the duty and the vicarious liability of the State. Special leave was revoked in relation to vicarious liability because legislation providing for vicarious liability was not in effect at the relevant time and no point of legal principle would be decided. In argument on the remaining ground, the State accepted that there would be cases where the only reasonable exercise of powers would be to report the matter to police. The trial judge had found that no authority acting reasonably could have failed to report the matter, and made findings on causation that were not challenged. In light of those matters, the case was not an appropriate vehicle to consider the common law duty issue. Special leave was therefore revoked. Kiefel CJ, Bell, Gageler, Keane and Gordon JJ jointly.

CONSTITUTIONAL LAW

Courts – Federal jurisdiction – Diversity jurisdiction

In *Rizeq v Western Australia* [2017] HCA 23 (14 June 2017) the appellant was convicted of drug charges under s 6(1) of the *Misuse of Drugs Act 1981* (WA). He was convicted by a majority of the jury, which was taken to be a guilty verdict under the *Criminal Procedure Act 2004* (WA). Technically, the trial took place in federal jurisdiction because the appellant was a resident of another state, meaning the case fell within s 75(iv) of the Constitution (matter between a state and a resident of another state). The appellant argued that, as a result, the offence provisions were picked up and applied by the *Judiciary Act 1903* (Cth). He then argued that, as the charges were federal, he had to be convicted by a unanimous verdict, as required by s 80 of the Constitution. The High Court rejected that argument. The trial was for offences against a state law – s 6(1) of the *Misuse of Drugs Act* – meaning that s 80 was not engaged. Section 79 of the Judiciary Act operates to fill gaps in the law applying in federal jurisdiction, to make that jurisdiction effective. While the relevant provisions of the *Criminal Procedure Act*, as procedural rules, were picked up and applied to make the trial effective, s 6(1) of the *Misuse of Drugs Act* was not a provision of the same kind. Rather, s 6(1) was enacted squarely within state legislative power. Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Kiefel CJ and Edelman J separately concurring. Appeal from the Supreme Court (WA) dismissed.

CRIMINAL LAW

Identification evidence – Exclusion of unfair evidence

In *The Queen v Dickman* [2017] HCA 24 (21 June 2017) the respondent was convicted of intentionally causing serious injury and making a threat to kill. The victim of the assault had identified a person other than the respondent in a photoboard. After investigation, that person was found to have an alibi. In a second photoboard, the victim identified the respondent. The police had told the victim that his first identification was wrong, and that the second photoboard contained the image of a suspect (the respondent), though the trial judge found that the victim had not been intentionally induced to select the respondent. A majority of the Court of Appeal held that the second identification should have been excluded under s 137 of the *Evidence Act 1995* (Vic), because any probative value was outweighed by prejudice to the respondent. A substantial miscarriage of justice had occurred. The High Court unanimously overturned that decision. The Court of Appeal had focussed on the low probative value of the evidence and identified only one point of prejudice, which might be addressed by appropriate jury directions in this case. The High Court held that although the probative value of the identification evidence was low, the danger of unfair prejudice was minimal in the circumstances of the case and could be addressed by directions to the jury. The Court also held that, even if there had been error in admitting the evidence, there was no substantial miscarriage of justice, as the evidence against the respondent was overwhelming. Kiefel CJ, Bell, Keane, Nettle and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

CRIMINAL LAW

Unreasonable or insupportable verdict

In *GAX v The Queen* [2017] HCA 25 (21 June 2017) the appellant was convicted of indecent dealing with a child, being his lineal descendant (count three), and acquitted of two charges of indecent dealing with the same child (counts one and two). The appellant appealed from the conviction on the basis that it was unreasonable and inconsistent with the acquittals on counts one and two. In the Court of Appeal, a majority held that the jury was entitled to find that the evidence on count three provided a rational basis to convict on that count while acquitting on the others. In the High Court, the principles to be applied were not in issue. The question was whether the whole of the evidence supported a finding that the appellant's guilt had been proved beyond reasonable doubt. The High Court held that the evidence supported an inference of guilt on count three, but the real possibility that the complainant's evidence was a reconstruction and not an actual memory could not be excluded beyond reasonable doubt. The Court therefore held that the conviction on count three was unreasonable. Bell, Gageler, Nettle and Gordon JJ jointly; Edelman J separately concurring. Appeal from the Court of Appeal (Qld) allowed.

OCTOBER

TAX LAW

Income tax – residence of a company – central organisation – Holding an office

In *Commissioner of Taxation v Jayasinghe* [2017] HCA 26 (9 August 2017) the High Court held that the appellant did not "hold an office" for the purposes of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) and was not exempt from paying income tax. Section 6(1)(d)(i) of the Act relevantly exempted from taxation salaries and emoluments received by those holding an office, or performing the duties of an office, in particular organisations, of which the UN is one. The High Court held that s 6(1)(d)(i) is concerned with the incidents of relationship between the person and the organisation, which depends on the substance of the terms of engagement. The structure of the organisation and the place of the person within it will be important, as will the duties and authorities associated with the person's position. In this case, the appellant was engaged as an independent contractor to an arm of the UN in his individual capacity to perform a specific task or complete a specific piece of work. He had no authority or right to enter into legal or financial commitments or incur any obligations on behalf of the UN. He was responsible for paying any tax levied by Australia on his earnings and was solely responsible for any claims arising for any negligent acts performed by him. He was not an official of the UN for the purposes of the Convention on the Privileges and Immunities of the United Nations. He therefore did not hold an office for the purposes of s 6(1)(d)(i). Kiefel CJ, Keane, Gordon and Edelman JJ jointly; Gageler J separately concurring. Appeal from the Full Federal Court allowed.

CRIMINAL LAW

Joint criminal enterprise – Murder and manslaughter

In *IL v The Queen* [2017] HCA 27 (9 August 2017) the appellant was relevantly tried on two charges: first, manufacturing a large commercial quantity of methylamphetamine; and second, murder, or alternatively manslaughter, pursuant to s 18(1) of the *Crimes Act 1900* (NSW). The deceased was killed when a gas ring burner was lit in a small and inadequately ventilated bathroom, causing a fire. Relevantly, on the second count, the Crown alleged that the appellant was guilty of 'felony' or 'constructive' murder (alternatively, manslaughter), because the act that caused the deceased's death was committed in the course of the joint criminal enterprise. The Crown could not exclude the possibility that the deceased lit the gas burner himself and was accidentally killed by his own act. However, it was argued that because the appellant participated with the deceased in the joint criminal enterprise, the appellant was criminally liable for all acts committed in the course of carrying out that enterprise. The trial judge directed the jury to enter a verdict of acquittal on the second count. The Court of Criminal Appeal overturned that decision. The High Court allowed an appeal by majority, for differing reasons. Kiefel CJ, Keane and Edelman JJ held that s 18 of the *Crimes Act* requires the killing of another. It is not engaged if a person kills himself or herself, whether intentionally or accidentally. Bell and Nettle JJ held that joint criminal enterprise only extends to attribute liability to participants in the enterprise for acts committed by others that are capable of comprising the actus reus of a crime. In this case, assuming it was the deceased's act that caused his death, no actus reus of a crime was committed. The appellant also could not be 'taken' to have lit the stove through the joint criminal enterprise – that confused liability of an act committed by an agent with the doing of the act itself. Gageler J and Gordon J dissented in separate judgments. Appeal from the Court of Criminal Appeal (NSW) allowed.

BANKRUPTCY

Creditor's petition – Whether Court can 'go behind' judgment to investigate debt

In *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28 (17 August 2017), Ramsay entered into an agreement with Compton Fellers Pty Ltd, trading as Medichoice. The respondent was a director of Compton Fellers. After the agreement expired and Medichoice went into liquidation, Ramsay started proceedings against the respondent, claiming $9,810,312.33 allegedly owed to it under the agreement. The respondent raised a defence disputing liability but not quantum, which was unsuccessful. Both parties were represented and there was no suggestion of fraud. The respondent then failed to comply with a bankruptcy notice served on him by Ramsay. Ramsay presented a creditor's petition in reliance on the failure to comply. In those proceedings, the respondent adduced evidence to show that Ramsay owed money to Medichoice, not vice versa. At first instance, the judge declined to go behind the judgment establishing the debt noting that the respondent had chosen not to dispute quantum. That decision was reversed on appeal, the Court holding that the central issue was not how the respondent ran the earlier proceedings, but whether there was reason to question whether the debt was truly owing. The High Court held that while a judgment is usually sufficient evidence of a debt, the discretion of a Bankruptcy Court to go behind a judgment is not limited to cases of fraud, collusion or miscarriage of justice. The obligation of the Court is to be satisfied that the debt on which the petitioning creditor relies is still owing. In this case, the evidence gave rise to the possibility that the debt was not truly owing and the Court should have investigated the issue. Kiefel CJ, Keane and Nettle JJ jointly; Edelman J separately concurring; Gageler J dissenting. Appeal from the Full Federal Court dismissed.

CONSTITUTIONAL LAW

Chapter III – Kable principle – Parole consideration conditions applying specifically to an individual

In *Knight v Victoria* [2017] HCA 29 (17 August 2017) the High Court held that legislation imposing conditions on the consideration of parole specifically for the appellant were valid. The plaintiff was sentenced to life imprisonment for each of seven murder counts and 10 years' imprisonment for each of 46 attempted murder counts, with a non-parole period of 27 years. Just before the non-parole period ended, s 74AA was inserted into the *Corrections Act 1986* (Vic). It applied only to the plaintiff and prevented his release on parole unless the Parole Board was satisfied that he was "in imminent danger of dying or is seriously incapacitated and that, as a result, he no longer has the physical ability to do harm to any person". The plaintiff argued, relying on Kable and limitations stemming from Ch III of the Constitution, that s 73AA interferes with the sentences of the Supreme Court and impairs the institutional integrity of the Court; and that s 73AA enlists judicial officers who are members of the Board in a function that is incompatible with the Supreme Court's exercise of federal jurisdiction. On the first point, the High Court held that s 73AA did not interfere with the sentence as it concerns only the conditions for the plaintiff's release on parole after the expiry of the minimum term. Those are matters outside the scope of the exercise of judicial power. On the second point, the Parole Board was not constituted by current judicial members in this case (and did not have to be). In those circumstances, there was no constitutional issue with the makeup of the Board. It was unnecessary and inappropriate to decide whether s 74AA would be invalid if the Board did have a current judicial officer as a member. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to questions in Special Case given.

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