HIGH COURT JUDGMENTS

ANDREW YUILE

Advocate's immunity

Legal practitioners – negligence – advocate's immunity from suit

In *Attwells v Jackson Lalic Lawyers* [2016] HCA 16 (4 May 2016) the High Court found that advocate's immunity did not extend to negligent advice given by a solicitor that resulted in a settlement and consent orders. Guarantors had guaranteed payment of the liabilities of a company to a bank up to $1.5 million. The company defaulted on its obligations to the bank and owed the bank approximately $3.4 million. The bank's action was settled on terms that judgment be entered for the bank against the guarantors for the full $3.4 million, not only the $1.5 million limit of their liability. The guarantors could, however, pay a reduced amount ($1.75 million) in discharge of their obligations. The appellants brought proceedings alleging that the settlement followed from negligent advice given by the solicitors. The solicitors sought to rely on the immunity. A majority of the High Court held that the immunity continues to be recognised in Australia, but that it did not extend to the circumstances of this case. The Court confirmed its decisions in *Giannarelli v Wraith* (1988) 165 CLR 543 and *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1.

The Court said that the required connection is between the work and the manner in which the case is conducted (at [5]). To attract the immunity, "advice given out of court must affect the conduct of the case in court and the resolution of the case by that court" (at [6]). The work must contribute to the exercise of judicial power in quelling the controversy between the parties (at [38]). It does not prevent a negligence claim against a lawyer which contributes to a settlement just because there is litigation in the background. It does not cover "advice which does not move the case in court toward a judicial determination" (at [39]). Rather, it covers work with an "intimate connection" to the conduct of the case, affecting an outcome by judicial decision (at [46]). The Court drew a distinction between a *historical* connection (eg advice precedes determination, so is connected to it) and a *functional* connection (the outcome is directly affected by the advice) (at [49]).

In this case, the immunity did not cover the advice given on settlement and an action in negligence could be brought. The fact that consent orders had been filed with the Court did not alter that analysis (at [59]). French CJ, Kiefel, Bell, Gageler and Keane JJ jointly; Nettle J and Gordon J dissenting separately. Appeal from the Court of Appeal (NSW) allowed.

Criminal law

Sentencing – manslaughter – *De Simoni* principle – extraneous considerations - totality

In *Nguyen v The Queen* [2016] HCA 17 (4 May 2016) the appellant pleaded guilty to manslaughter and causing grievous bodily harm after a firefight with police that resulted in the death of an officer. If the appellant had known the deceased was a police officer, the offence would have been murder, but that could not be made out. In sentencing, the trial judge found that the case was not in the "worst case" category, contrasting it with a case where the appellant knew the deceased was a police officer. The Court held that, by drawing the contrast with the more serious offence, the judge had taken into account an irrelevant consideration. It was not, however, a breach of the principle in *R v De Simoni* (1981) 147 CLR 383 as the Crown had argued. The Court also held that the sentence imposed was manifestly inadequate in the circumstances of the case. Bell and Keane JJ jointly; Gageler, Nettle and Gordon JJ jointly concurring. Appeal from the Court of Appeal (NSW) dismissed.

Tort

Negligence – Duty of Care – solicitor's duty to client when advising

In *Badenach v Calvert* [2016] HCA 18 (11 May 2016) the High Court considered the scope of the duty of care owed by a solicitor when preparing a will for a client. The appellant took instructions to draw a will for a client. The will left no provision for an estranged daughter. After the client's death, the daughter brought an action under the *Testator's Family Maintenance Act 1912* (Tas) and got an order for provision out of the estate. The respondent argued that the solicitor was negligent in not advising on the possibility of a claim by the daughter and not advising on ways to prevent the daughter receiving some of the estate. The Court held that the solicitor had a duty of care to provide advice as to options arising from the original retainer. The solicitor should have observed that no provision was made for family members and inquired. On learning about the daughter, he would have been obliged to advise of a risk of a future action and to present options. However, without further information and instructions, no further actions could be hypothesised for the reasonable solicitor, and proffering advice on options to deprive the daughter of property in the estate was not within the scope of the original retainer. Causation also provided an insurmountable hurdle to the claim: it could not be concluded what the client would have done and the statutory "but for" test could not be satisfied. An argument that the damage was the "loss of a chance" was rejected. French CJ, Kiefel and Keane JJ jointly; Gageler J and Gordon J concurring in separate judgments. Appeal from the Full Court of the Supreme Court (Tas) allowed.

Workers compensation

Meaning of "injury" and "disease" – *Safety, Rehabilitation and Compensation Act 1988* (Cth)

In *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 (11 May 2016) the High Court considered the meaning of "injury" under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The respondent claimed to suffer from significant dizziness akin to a kind of "vertigo". The question was whether the dizziness described could be an injury. Under the Act, "injury" included "disease" or other "injuries". The Court said that the central element of an "injury" was a physiological change, usually sudden or dramatic in nature (though suddenness is not necessary). The Court set out questions for Tribunals at [50]-[53]: is there an "ailment" (which would be a "disease")? Or is there an injury, in the sense of a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, arising out of employment? Whether such a change exists is an objective question for evidence, not a subjective inquiry. In the circumstances, the respondent's position was not an "injury". French CJ, Kiefel, Nettle and Gordon JJ jointly; Gageler J separately concurring. Appeal from the Full Federal Court allowed.

Constitutional law

Election of senators

In *Day v Australian Electoral Officer for the State of South Australia* [2016] HCA 20 (13 May 2016) the High Court dismissed a challenge to recent changes to the way voting on Senate ballot papers operates under the *Commonwealth Electoral Act 1918* (Cth), made by the *Commonwealth Electoral Amendment Act 2016* (Cth). The new process had been argued to: involve more than one method of choosing Senators, contrary to s9 of the Constitution; contravene the requirement in s7 of the Constitution for Senators to be "directly chosen by the people"; infringe a requirement of direct proportional representation; deceive voters and hinder their exercise of a free and informed vote; and prevent the free flow of information and impair freedom of political communication. The Court rejected each of these in short compass. French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ jointly. Application in the original jurisdiction dismissed. ■

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