VICTORIAN BAR

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

CASE REVIEW PANEL

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DAMAGES

***Comensoli v O'Connor* [2023] VSCA 131**– **key issues:** Appeal on assessment of damages, sexual abuse

- The Plaintiff at first instance commenced proceedings in the Supreme Court of Victoria. He claimed damages for injuries suffered as a result of abuse on three occasions between 1968 and 1970.
- The trial judge assessed the damages as follows:
  - $525,000 for pain and suffering damages.
  - $15,000 for future treatment expenses.
  - $1,500,000 for economic loss.
- The Court of Appeal (Beach, Niall and Kaye JJA) found that although the award of $525,000 for general damages may be said to be high, it was not demonstrated that it was manifestly excessive nor did any of the matters relied on constitute a specific error or otherwise vitiate the award.
- '…the destructive impact of child sexual abuse is becoming better understood.' [114]

DAMAGES CONT

***Lapetina v Elgee Park Pty Ltd* [2024] VSCA 39** (Beach & Niall JJA, & J Forrest AJA)

- The Plaintiff obtained an award of damages for psychiatric injury arising from her employment.
- At primary judge assessed damages in the sum of $300,000, comprising components for pain and suffering, past loss of earnings, and superannuation losses - this amount was reduced having regard to the receipt of weekly payments and judgment in the sum of $150,000 was entered - the applicant sought leave to appeal.
- **Appeal dismissed**: an allowance may be made for contingencies or vicissitudes; the primary judge had not erred in assessing such damages; the primary judge's reasons adequate- the judge provided a reasoned explanation for his conclusion that the applicant was likely not to have worked beyond a certain date.

DAMAGES CONT

***WQA v Comensoli and Trustees of the Christian Brothers* [2023] VSC 657**

key issues: Whether compensation affected payments made outside the preclusion period go in reduction of damages.

- P's claim related to abuse that took place between 1959 and 1961 and included a claim for loss of earning capacity. P received social security payments between 1992 and 2015 but these payments were not repayable to the Commonwealth out of the damages payment due to the passing of the preclusion period.
- D submitted that the social security payments ought to be taken into account in the calculation of damages for past economic loss, so as to reduce the damages. Parties sought Court determination of single issue.
- P submitted that the legislature intended to create one arrangement that applied to all relevant social security payments: that they were to be ignored in the assessment of damages but were repayable to Cth to the extent that repayment was required by the calculation provided for in the legislation.
- Court held that the *Social Security Act 1991* (Cth) revealed an intention to replace previous complex/uncertain common law position with a single overall scheme, so that compensation affected payment are not to be considered in the damages assessment either during or after a preclusion period.

VICARIOUS LIABILITY

Garrett v Victorian WorkCover Authority **[2023] VSCA 144 – key issues:** vicarious liability, criminal conduct and psychological injury

- The plaintiff sought damages from the defendant, the Victorian WorkCover Authority, as a result of psychological injuries sustained in the course of the plaintiff's employment as an armed security guard with The Staff Factory Pty Ltd. The circumstances in which the plaintiff's claim arose are that his co-security guard, Mr Corey Thrower, for no apparent reason pulled his loaded firearm out of its holster and pointed it directly at the plaintiff's head.
- The plaintiff alleged negligence on the part of the employer, and vicarious liability for the intentional actions of Mr Thrower.
- The trial judge dismissed the plaintiff's claim for damages as a result of psychological injuries.
- The Court of Appeal dismissed the Plaintiff's appeal.

VICARIOUS LIABILITY CONT

***CCIG Investments Pty Ltd v Schokman* [2023] HCA 21**

key issues: vicarious liability, whether employer liable for tortious act of employee in circumstances where act occurred in shared staff accommodation

Facts: Mr S worked for resort in the Whitsunday Islands and was required to live in shared employee accommodation with Mr H. One night Mr S woke to Mr H urinating on him. Mr S suffered a cataplectic attack as a result of the incident and brought proceedings against his employer, claiming it was vicariously liable for Mr H's actions because the act was done in the course or scope of his employment.

At first instance: trial judge did not accept course or scope of employment.

Court of Appeal: Allowed Mr S' appeal – terms of employment provided requisite connection between the act and Mr H's employment.

High Court: employer not liable. 'course of scope of employment' depends on circumstances of the case, including what the employee was employed to do and held out as being employed to do. Nothing here suggested Mr H's act was authorised, required by or incidental to his employment – no real connection.

ADMISSIONS

Sepe v Club Italia Sporting Club Inc (Ruling)[2023] VSC 191 – **key issues**:
Admissibility of payments of WorkCover payments

- Ruling Her Honour Justice Tsalamandris
- Ms Sepe lodged a WorkerCover claim on 16 August 2018 and this claim was accepted by the authorised agent on behalf of Club Italia. Ms Sepe briefly returned to work on light duties and reduced hours in early 2019, but has not worked since August 2019. Ms Sepe has continued to receive weekly payments of compensation from the time she lodged her claim, including at the time of trial.
- Her Honour ruled that the ongoing payments constituted an admission by Club Italia, and that such evidence should not be excluded from the jury.
- At [11] in determining the evidence should be before the jury Her Honour was satisfied of two things:
    - Ms Sepe's receipt of ongoing weekly payments of compensation was an admission by conduct, on the part of Club Italia, that was capable of being admissible evidence as it was relevant to Ms Sepe's claim for past loss of earnings; and
    - a jury could be (and was) suitably directed as to its use of this admission in respect of its assessment of Ms Sepe's claim for past loss of earnings, so that it was not unfairly prejudicial to Club Italia, nor misleading or confusing.

ADMISSIONS CONT

Moore v Goldhagen [2024] VSCA 2

- TAC claim in which the plaintiff Mr Moore alleged that he was struck by a bus driven by the defendant Mr Goldhagen and sustained physical and psychological injuries
- At trial:
  - Mr Moore was cross-examined about the reports he had made to the TAC and Victoria Police, as both written reports included a reference to the bus mounting the kerb. Mr Moore denied that he had ever told anybody that the bus had mounted the kerb.
  - Mr Goldhagen denied negligence and alleged contributory negligence, but did not give evidence and called no witnesses. The TAC Report and Police Report were not tendered in evidence.
- **Key issues on appeal**: Failure to call critical witness; use of prior inconsistent statements in evidence; evidence of TAC payments; reference to *Sepe v Club Italia Sporting Club Inc*

ABUSE CASES

GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore **[2023] HCA 32** – **key issues:** abuse of process justifying permanent stay

- Appellant claimed to have been sexually assaulted by priest of Roman Catholic Diocese of Lismore.
- The appellant instituted proceedings on 31 January 2020 against respondent, on bases of negligence and vicarious liability. The priest died in 1996.
- The primary judge satisfied material showed that there likely to be evidence available allowing fair trial between parties
- The respondent sought permanent stay of proceedings –primary judge refused stay, but decision reversed by Court of Appeal
- The NSWCA of Appeal considered fair trial could not be had in circumstances where priest unavailable to give factual instructions and respondent had not been notified of claims before priest's death and that proceedings ought to be stayed on basis that fair trial could no longer be had such that proceedings an abuse of process.
- High Court of Australia allowed an appeal from the NSWCA and dismissed the permanent stay. The court decided that the mere passing of time is not relevant when exercising the power to permanently stay proceedings for death or personal injury resulting from historic child sexual abuse.

ABUSE CONT

Catholic Archdiocese of Melbourne v RWQ and Pell [2023] VSCA 197

key issues: whether *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* **(Legal Identity Act)** applies to secondary victims

Facts: RWQ brought claim seeking damages for mental harm suffered as a result of being informed of sexual abuse of his late son and the reason of his son's death. D denied that the Legal Identity Act applied because the claim was not a claim 'founded on or arising from child abuse.'

Orders sought for preliminary determination of this issue – at first instance Court held the Legal Identity Act applied.

On appeal, CoA agreed with primary judge's construction and refused leave to appeal. Considered principles of statutory construction – ordinary meaning, context and legislative purpose – father's claim was 'founded on or arising from child abuse'.

Confirms that secondary victims can pursue claims against nongovernment organisation under the Legal Identify Act (ie. D cannot claim 'Ellis defence')

ABUSE CONT

Trustees of the Christian Brothers v DZY [2024] VSCA 73

key issues: application to set aside previous settlement agreement – only set aside in relation to heads of damages previously claimed – ie. Economic loss excluded.

Facts: DZY had two prior settlements with the Christian Brothers in 2012 and 2015, with both settlement deeds acknowledging he did not allege he suffered economic loss. Both deeds were made before Ellis defence was abolished by the Legal Identity Act. The first deed was made before the limitation period was removed for child abuse claims.

At first instance both Deeds ordered to be set aside in their entirety.

The Trustees sought leave to appeal in relation to claim for economic loss – submitted that it had not been part of previous claim and had not been affected by Ellis or limitation defences.

CoA found that DZY's decision not to pursue economic loss claim had been motivated by fear of Centrelink repayment and had not been materially influenced by the limitations or Ellis defence. Held that the deeds should not be set aside in respect of the economic loss claim (though they were set aside insofar as they related to general damages).

ABUSE CONT

Bird v DP (a pseudonym) [2023] VSCA 66 (Beach, Niall and Kaye JJA) – **key issue**: vicariously liability

At first instance: The claim was made on two bases, that the Diocese was:

1.vicariously liable for the assaults committed by Coffey; and

2.directly liable in negligence as a result of the failure by the Bishop of the Diocese to exercise reasonable care in his authority, supervision and control of the conduct of Coffey.

Forrest J held that the Diocese was vicariously liable for the assaults, but that the Respondent had not established that the Diocese was directly liable to him in negligence. Damages in the sum of $230,000.

Court of appeal: Upheld the decision of Forrest J. The Court of Appeal held that '*Coffey was the servant of the Diocese, notwithstanding that he was not, in a strict legal sense, an employee*',

MEDICAL PANEL/ WRONGS ACT

Vicinity Centres PM Pty Ltd v Arik **[2023] VSCA 295** – **key issues**: Medical Panel found motion of the right hip that provides the highest rating is used to determine impairment for that joint. Special leave application refused.

- The Medical Panel assessed Ms. Arik's injured hip in accordance with Section 3.2e of the AMA Guides, and stated *'As the process of rating range of motion deficits of the lower extremity is based on a classification of mild, moderate or severe, the Panel is of the opinion that the direction of motion of the right hip that provides the highest rating is used to determine impairment for that joint."*
- **At judicial review -** *Arik -v- Vicinity Centres PM Pty Ltd* [2023] VSC 94 the SCV found that the Medical Panel had not applied the AMA Guides properly, stating *'It should have combined the whole-person impairment estimates for the several range of motion restrictions it measured in her right hip, rather than determining her degree of impairment by taking the highest rating. This amounted to a jurisdictional error in the formation of the Panel's opinion.'*
- **Court of appeal:** Justice Niall and Justice Macaulay concluded, opining that the appeal should be allowed, Dissenting Justice Kennedy agreed with Justice Richards of the Supreme Court that the Medical Panel opinion should be quashed.
- A special leave application was made to the High Court which was refused on the basis that the reasoning of the majority of the Court of Appeal is plainly correct.

MEDICAL PANEL/ WRONGS ACT CONT

***Citywide Service Solutions Pty Ltd v Rosata; Kabbout v Crown Melbourne Ltd* [2023] VSCA 281** – **key issues**: Significant injury threshold levels; determination of significant injury in cases where plaintiff's claim made against more than one defendant; whether medical panel determination made after referral by one defendant binds defendants who were not parties to referral

Court of Appeal: held that a significant injury determination by a Medical Panel only binds the defendant who made the referral to the Medical Panel, referring at [85]-[98] to its reasons for preferring that construction of Part VBA, but essentially finding that:

- there was nothing in Part VBA preventing different Medical Panels from performing their statutory functions and obligations, and providing different determinations in relation to the same injury or claim ([87]); and
- there was no warrant for a construction of the *Wrongs Act 1958* that would have a respondent, who had no entitlement to provide material or make submissions to the Medical Panel, to be bound by a Medical Panel determination to which it was not a party ([95] and [97]).

SERIOUS INJURY APPEALS

***Metro Trains Melbourne Pty Ltd v Keay* [2023] VSCA 223** – **key issues**: Train driver psychological injury, cumulative incidents, interaction between TAA and WIRCA/ AC Act

- In the period between 2005 and 2015 the Plaintiff was employed as a train driver by Metro Trains Melbourne. In the course of his employment, he sustained a psychiatric injury following a series of traumatic incidents culminating in a discrete incident involving a 'near miss'.
- The Plaintiff commenced proceeding sin the County Court against the TAC seeking leave under s 93(4)(c).
- The Plaintiff was invited the court to reconsider the proceeding under the TA Act. Namely, whether an alternative application pursuant to s 134AB(16)(b) of the *Accident Compensation Act 1985* given calmative nature of incidents. The Plaintiff commenced a second proceeding under the AC Act.
- Plaintiff granted leave to commence proceedings for the recovery of damages in both the TAC and AC Act actions, respectively.
- **Court of Appeal:** There was no dispute in the Appeal that the near misses and fatalities that occurred in the Plaintiff's employment as a train driver, giving rise to his psychiatric injury, were transport accidents within the meaning of the TA Act.

SERIOUS INJURY APPEALS

Ali v Victorian Workcover Authority **[2023] VSCA 156** – **key issues**: whether trial judge failed to show path of reasoning in dismissing application under mental impairment definition – leave to appeal refused

- P injured left forearm whilst using an angle grinder. Brought application in respect of injuries causing impairment to left upper limb and neck, and psychiatric injuries (ie paragraphs (a) and (c) of s325).
- SI application rejected and OM proceeding commenced. Trial judge dismissed application.
- P appealed on basis trial judge dismissed paragraph (c) without showing proper path of reasoning and erred on not granting leave based on paragraph (c). P submitted trial judge ignored psychiatric treatment that P had received.
- CoA rejected that submission. Judge made very significant adverse credit findings against the applicant. The judge 'concluded that the reliability of [the expert opinions] reliant as they were on the applicant's asserted level of disability, was seriously undermined. This reasoning in the primary judgement is explicit, and when read with the judges' comprehensive credit findings elsewhere in this judgement, more than adequate.' [at 89]
- 'There is no error in the judge's reasoning… The judge was entitled to conclude that the histories underpinning the psychiatric opinions were floridly exaggerated.' [91]

SERIOUS INJURY APPEALS

Connelly v TAC **[2024] VSCA 20** – **key issues**: knee injury with multiple significant consequences likely to be suffered for decades – likelihood and/or risk of deterioration requiring further surgery – whether judge erred in failing to be satisfied that consequences were collectively very considerable – appeal allowed.

- Trial judge found severity of knee injury did not meet threshold of being 'very considerable' per *Humphries v Poljak*.
- P sought leave to appeal on basis that trial judge failed to adequately consider, or misunderstood, the medical evidence; that the trial judge failed to provide adequate reasons; and that on proper evaluation of the impairment consequences the injury fell within the definition of serious injury, so trial judge's conclusion to the contrary was plainly wrong.
- CoA: 'While each consequence when looked at individually may only have fairly been described as 'significant', when considered collectively, and bearing in mind both the length of time the applicant will suffer from his injury and the importance to the applicant of each of the losses identified, there is little doubt that the applicant's injury is very considerable.' [50]

SERIOUS INJURY APPEALS

***Popal v TAC* [2023] VSCA 222** – **key issues**: aggravation of pre-existing lumbar spine disease - whether judge made error of fact – leave to appeal refused – self rep

- Trial judge dismissed application and held P failed to establish the impairment consequences from the compensable injury satisfied test for serious injury – primarily on basis P was not a credible witness and failed to adduce appropriate evidence from treating doctors.
- P sought leave to appeal (self-represented) on basis the judge erred in relation to facts of the application and the judge's reasons were unreasonable.
- CoA observed that P adduced no reports from treaters; significant medical material regarding pre-existing back pain was not referred to in affidavit or provided to medico legal doctors (with one exception) and there was no lay witness evidence. CoA noted that while there is no check-list, a court will ordinarily be assisted by certain material.
- CoA held that the judge did not err in any of the ways alleged. Was not obliged to accept P's evidence in the absence of corroborating evidence. Judge was entitled to make findings in respect of P's reliability and credibility.
- Application for leave to appeal refused.

Thanks!

Any questions?