GREENS LIST
BARRISTERS

2018 COMMON LAW YEAR IN REVIEW

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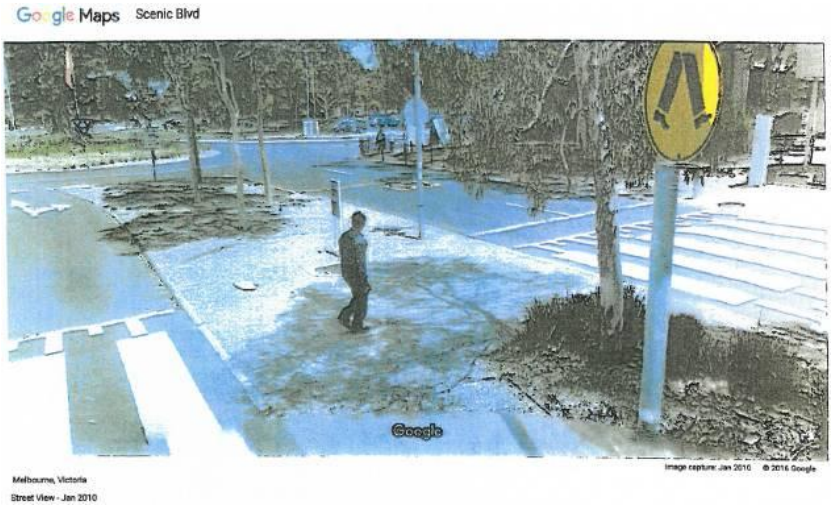
1 NOVEMBER 2018

1. This paper discusses three cases being: *Monash University v Savage & Anor* [2018] VSCA 156; *K R v B R & Anor* [2018] VSCA 159; and, *Hingst v Construction Engineering (Aust) Pty. Ltd.* [2018] VSC 136.

Monash University v Savage & Anor [2018] VSCA 156

2. The case of *Monash* provides a helpful discussion on occupier's liability pursuant to s14B of the *Wrongs Act* 1958 (Vic), and the content and scope of the duty of care.
3. Ms Savage suffered injury when she stepped into a puddle and rolled her ankle walking in the carpark at Monash's Clayton campus. She was working as a security guard at the time.
4. The area comprised a pedestrian crossing over a median strip within a sealed divided road. It was surfaced with Dromana toppings, which is essentially crushed rock. A Google image of the area is annexed to the judgment and is depicted below:



5. At trial Monash contended that its duty of care did not extend to removing or preventing the hazard. Monash also instituted third party proceedings against Program Maintenance Services Limited ('PMS'), alleging that it had failed to take reasonable care in maintaining the area. The third-party proceeding was dismissed. The trial judge found for Ms Savage and awarded general damages in the sum of $275,000.00.[1]
6. The thrust of Monash's appeal was that the trial judge erred in his assessment of what was reasonable for the occupier to do in providing and maintaining the crossover.
7. Monash submitted that the surface was 'absolutely typical' of the kinds of gravel path regularly encountered in daily life. It had no unusual hazards. Monash relied on the case of *Neindorf v Junkovic* where Hayne J noted that an occupier:

> '*... was not required to reduce or eliminate the danger presented by an unevenness in the driveway that was no larger than, and no different from, unevenness found in any but the most recently installed suburban concrete driveway*.'

8. Osborn JA rejected the above contention on the basis that the hazard:
   (a) was located within a heavily trafficked pedestrian pathway;
   (b) was susceptible to becoming worn and displaced;
   (c) arose out of the recurrent creation of depressions within the surface;
   (d) The depressions were susceptible to the creation of puddles;
   (e) The puddles concealed the base of the depression and any unevenness;
   (f) Puddling had been known to occur on the crossover;
   (g) The surface had caused a number of prior tripping incidents at the crossover;
   (h) The crossover was readily and cost effectively capable of being fixed; and
   (i) was sealed post incident at a cost of $2,575.00.[2]

[1] Left ankle. Initially a minor strain. Deteriorated post arthroscopic surgery. Chronic pain disorder.
[2] *Monash University v Savage & Anor* [2018] VSCA 156, [12].

9. The Court of Appeal concluded that Monash knew or ought to have known that the hazard might occur having regard to the aforementioned factors, and the duty of care owed to Ms Savage extended to prevention of the hazard.[3]
10. In relation to PMS, it was not established that it failed to identify and rectify the hazard. Rather, PMS had 'dutifully' maintained a weekly maintenance inspection regime.

***K R v B R & Anor* [2018] VSCA 159**

1. *K R v B R & Anor* [2018] VSCA 159 is an intentional torts case involving an alleged sexual assault at an ashram in Mount Eliza.
2. The Court of Appeal judgment provides a useful summary on the operation of Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act* 1958 (Vic) ("the EMPA"), and the requirement of leave before a party may issue a subpoena or adduce evidence of "confidential communication" as defined in s32B of the EMPA. That is a communication made in confidence by a person against whom a sexual offence has,[4] or is alleged to have been committed to a registered medical practitioner or counsellor.
3. Division 2A was inserted by s 4 of the *Evidence (Confidential Communications) Act* 1998 (Vic) to prevent sexual assault victims being deterred from reporting to doctors or counsellors in the course of their treatment.[5]
4. Section 32C:
    (a) Provides for the prima facie exclusion of evidence of confidential communications;
    (b) It relates to both criminal and civil proceedings;
    (c) It provides for sequential prohibitions upon the access to and use of confidential communications subject to leave;
    (d) It requires notice to be given to interested parties of any application;

[3] Above n. 2, [13].
[4] A "sexual offence" means an offence to which clause 1 of Schedule 1 of the *Sentencing Act* 1991 (Vic).
[5] Because of uncertainty and fear about unwarranted access to their records being granted by courts.

(e) It grants standing to an interested medical practitioner to address the question of leave; and

(f) It provides that the Court may order that a document be produced to it for the purposes of determining an application.[6]

5. Section 32D governs the granting of leave and requires satisfaction of three sequential preconditions:

(a) That the evidence '*will*' – not '*may*' – have '*substantial*' probative value to a fact in issue;

(b) other evidence of similar or greater probative value is not available; and

(c) the public interest in preserving the confidentiality and protecting a confider from harm is substantially outweighed by the interest in admitting the evidence.[7]

6. Section 32AB sets out social factors giving rise to public interest including:

(a) the high incidence of sexual violence within society;

(b) under-reporting;

(c) that offences are often committed against vulnerable persons; and

(d) the frequent absence of any physical signs of an offence.

7. The balancing exercise under s32D is broadly analogous to claims of public interest immunity.[8]

8. Section 32E provides limitations on privilege, including the consent of the protected confider. Section 32F provides for ancillary orders such as supressing parts of evidence.

9. In *K R* the second defendant's solicitors issued subpoenas to various medical practitioners and counsellors including the plaintiff's treating psychiatrist, Dr Robertson.

[6] *K R v B R & Anor* [2018] VSCA 159, [34].
[7] Ibid, [37]-[39].
[8] Ibid, [43]-[44]; that is, balancing the public interest in admitting into evidence information relating to matters of state against the public interest in preserving confidentiality taking into a range of non-exhaustive factors under s130(4) - (5) of the *Evidence Act* 2008 (Vic) - including prejudice and the importance of the evidence.

10. The subpoena to Dr Robertson required a blanket production of the plaintiff's medical file. An objection under s32C was made.
11. The subpoenas were set aside at a directions hearing and the question of leave was referred to Judge Carmody. His Honour acknowledged the second defendant's argument that confidentiality had been waived over records of Dr Robertson that had previously been served by the plaintiff.
12. His Honour noted that the communications attracted s32B and that leave was required before subpoenas could be issued, and that the statutory provisions override any common law privilege relating to waiver.
13. The judge concluded that the public interest in preserving confidentiality and the plaintiff from further harm outweighed the perceived risk of prejudice to the second defendant. It is noted that the second defendant had the plaintiff examined by Professor Doherty, and could rely on his report. The judge referred to the 'very high' public interest in encouraging people alleging sexual assault to obtain counselling and professional medical help.
14. The grounds for appeal centred on whether the judge erred in his approach and application to s32C, s32F and waiver.
15. The Court of Appeal concluded that s32C required the second defendant to obtain leave to issue the subpoena directed to Dr Robertson. There was no waiver as the plaintiff had not consented to the production of evidence in terms of s32E(1), and the plain words of the text do not readily embrace the notion of an implied waiver.
16. In relation to the application of ss32C and 32F, the submission that the judge could not properly weigh up the matters without first inspecting the documents was rejected.
17. When confronted with this issue consider whether ss32B and 32C apply. Claim privilege where appropriate. Alternatively, defendant solicitors should consider what other evidence can be obtained and if necessary the appropriate steps for applying for leave to issue subpoenas or adduce evidence. Such steps are found in the Magistrates' Court Practice Direction No 9 of 2016, and, the County Court Common Law Division Practice Note

PNCLD 2-2018. The current Supreme Court Practice Note SC CL 3 does not address the issue directly but page 3 under the heading of 'Interlocutory Applications' provides a point of reference.

Hingst v Construction Engineering (Aust) Pty. Ltd. **[2018] VSC 136**

18. This case concerns a psychiatric injury on a background of alleged workplace bullying.
19. Mr Hingst was self-represented in a trial that lasted 18 sitting days with approximately 15 witnesses.
20. Mr Hingst was employed by the defendant as a contract administrator. His alleged injuries included stress, depression, fibromyalgia and IBS, for which he claimed damages in the sum of $1,805,138.00. (He also claimed unfair dismissal which is not discussed in this paper).
21. Mr Hingst's case centered on his relationship with three colleagues and an alleged conspiracy to marginalise him and terminate his employment. The alleged bullying can be summarised as:
    (a) being verbally abused about his work performance;
    (b) being told that coffee he had prepared was 'sh*t';
    (c) exclusion from meetings;
    (d) being exposed to office flatulence;
    (e) horseplay; and
    (f) a confrontation about his sexuality following a Christmas lunch at the Olive Tree restaurant.
22. Zammit J was not persuaded that Mr Hingst had been bullied in the workplace. Nor was her Honour persuaded that the defendant should have known that Mr Hingst was suffering from a psychiatric injury and negligently failed to intervene.
23. Mr Hingst was profoundly hurt by the loss of his job which led him to react in an extreme way to seek revenge against the defendant. His evidence was found to be confusing and he became entrenched in themes of conspiracy and deception. He treated the proceeding as if it

were a 'judicial commission of inquiry' into the way the defendant company operated rather than a bullying claim at common law.

24. Zammit J provides a very helpful summary of the law on bullying at common law [at 6 to 14].

25. The law imposes on an employer a duty to take reasonable care to avoid causing its employees a recognisable psychiatric injury.[9] An employer will be prima facie liable if it knew, or ought to have known, that an employee was at risk of being bullied and did not take steps to ameliorate that risk.

26. An employer will also be vicariously liable for the negligent acts or omissions of its employees in the scope of their employment where the bullying gives rise to a reasonably foreseeable and recognisable psychiatric injury.[10]

27. Zammit J quoted the working definition of bullying found in WorkSafe Victoria's guidance note on the Prevention of Bullying and Violence dated February 2003, which is found in the judgment of Osborn JA in *Brown v Maurice Blackburn Cashman*,[11] and cited with approval in *Swan v Monash Law Book Co-operative*,[12] *Johnston v Holland*[13] and *Johnson v Box Hill Institute of TAFE*.[14]

28. Workplace bullying is:

    (g) repeated, unreasonable behaviour directed toward an employee, or group of employees, that creates a risk to health and safety.

    (h) *Unreasonable behaviour* means behaviour that a reasonable person, having regard to all the circumstances would expect to victimise, humiliate, undermine or threaten.

    (i) *Behaviour* includes actions of individuals or a group, and may involve using a system of work as a means of victimising, humiliating, undermining or threatening.

[9] See, e.g., *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44 ('*Koehler*').
[10] *Hingst v Construction Engineering (Aust) Pty. Ltd.* [2018] VSC 136, [8].
[11] (2013) 45 VR 22 ('*Brown*').
[12] [2013] VSC 326.
[13] [2016] VSC 422, [25].
[14] [2014] VSC 626 ('*Johnson*').

(j) *Risk to health and safety* includes a risk to the mental or physical health of the employee.[15]

29. This definition raises two threshold questions:

(k) was there unreasonable behaviour directed towards the plaintiff;[16] and

(l) if there was, did it occur repeatedly?[17]

30. Zammit J noted [at 11] that:

> '*to make out a bullying claim at common law, a plaintiff must show on the balance of probabilities that there was an established pattern of behaviour in the workplace, which was repeated and unreasonable, and which a reasonable person in all the circumstances of the case would expect to give rise to a recognisable psychiatric illness*.'

31. A central feature of this analysis is that the behaviour and the causative injury must satisfy the test of reasonable foreseeability as set out in *Tame v New South Wales*,[18] and restated in the context of psychiatric injury in *Koehler v Cerebos (Aust) Ltd*.[19] Most significant, for present purposes, was the requirement that there be 'evident signs' of an employee's inability to carry out work activities associated with the risk of psychiatric injury. Absent those evident signs 'warning of the possibility of psychiatric injury' an employer is entitled to assume that its employee is capable of performing his or her job.

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[15] Worksafe Victoria, 'Prevention of Bullying and Violence at Work: Guidance Note' (February 2003) [32] quoted in *Brown* (2013) 45 VR 22, 26, [13]. This definition reappears, lightly revised, in WorkSafe Victoria's guidance note of October 2012: 'Workplace bullying is characterised by persistent and repeated negative behaviour directed at an employee that creates a risk to health and safety': at 2.
[16] E.g. behaviour that a reasonable person having regard to all the circumstances would expect to victimise, humiliate, undermine or threaten a person.
[17] *Brown* (2013) 45 VR 22, 26 [15].
[18] (2002) 211 CLR 317 [12].
[19] (2005) 222 CLR 44.