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Weekly Criminal Law

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering criminal

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Executive Summary

The King v Anna Rowan - A Pseudonym (HCA) - trial judge erred in refusing to allow a defence of duress where the threat of violence was implicit

Hurt v The King; Hurt v The King; Delzotto v The King (HCA) - Commonwealth minimum sentence provision for possession of child abuse material mandates the double function approach, where the minimum sentence operates both as a restriction on sentencing power, and as a yardstick informing the exercise of the sentencing discretion

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Summaries With Link (Five Minute Read)

The King v Anna Rowan - A Pseudonym [2024] HCA 9
High Court of Australia
Gageler CJ, Gordon, Edelman, Jagot, & Beech-Jones JJ
Duress - the respondent had a full-scale IQ of 70 and a mild intellectual disability, with her abstract reasoning, vocabulary, and general knowledge in the bottom 0.5% of the population - the respondent's partner was charged with a number of sexual offences against two of their children, and the respondent was then also charged, with 13 joint counts being brought against the respondent and her partner - the partner was convicted of the separate counts, but the jury was unable to return verdicts on the joint counts - the trial judge at the retrial held there was no factual basis for the respondent to rely on a defence of duress - the partner was granted a separate trial on the joint counts, and the prosecution decided not to prosecute him further - the respondent was found guilty of 12 of the 13 counts, after the jury was not instructed as to duress, and was sentenced to imprisonment of seven years and five months with a non-parole period of four years and eleven months - the Court of Appeal upheld the respondent's appeal on the ground that the trial judge had erred in ruling duress was not available, and ordered a retrial - the Crown was granted special leave to appeal to the High Court - held: subject to any statutory provision to the contrary, the accused bears an evidential burden to raise a defence of duress and, if discharged, the prosecution bears the legal burden of proving beyond reasonable doubt that the accused did not act under duress - the accused's evidential burden is satisfied if there is evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt that each of the elements of the defence had been negatived - it is an element of duress that there be a threat to impose the relevant form of harm unless the accused commits the acts that constitute the offence charged - the threat can be formulated in words or left unsaid - the Court of Appeal had not erred and its approach was consistent with the accepted understanding of the nature of the threat required for the defence of duress at common law - , the evidence of pervasive violence, intimidation, control, and sexual abuse perpetrated by the partner on the respondent and their children over a sustained period raised a reasonable possibility that any express or implicit demand the partner may have placed on the respondent to join in the sexual abuse of the children carried with it the implication that serious violence and more severe sexual abuse would be inflicted on the respondent or their children if she refused - s322O of the *Crimes Act 1958* (Vic), which had abolished the common law defence of duress in Victoria, applied to only one of the counts, and for the purposes of this case raised the same issues as the common law defence - appeal dismissed.
The King

Hurt v The King; Hurt v The King; Delzotto v The King [2024] HCA 8
High Court of Australia
Gageler CJ, Edelman, Steward, Gleeson, & Jagot JJ
Minimum sentences - Hurt and Delzotto both pled guilty to Commonwealth offences including

possessing child abuse material - s16AAB of the *Crimes Act 1914* (Cth) provides for a minimum term of imprisonment, subject to limited exceptions, for such offences - trial and intermediate appellate courts throughout Australia have generally adopted a double function approach to minimum sentence provisions, where the minimum sentence operates as both a restriction on sentencing power and a yardstick informing the exercise of the sentencing discretion - there is also a single function approach, where such minimum sentence provision operates only as a restriction on sentencing power - in Hurt's case, the sentencing judge and the majority of the ACT Court of Appeal applied the double function approach, but a dissenting judge in the Court of Appeal would have applied the single function approach - in Delzotto's case, the sentencing judge applied the single function approach, and the NSW Court of Criminal Appeal allowed a Crown appeal against inadequacy of sentence and applied the double function approach - Hurt and Delzotto were both granted special leave to appeal to the High Court - held (by Edelman, Steward, & Gleeson JJ; Gageler CJ & Jagot JJ agreeing for different reasons): a parliamentary intention to adopt the double function approach was clearly manifested in the second reading speech - at the time that s 16AAB was enacted, the double function approach had also been adopted consistently throughout Australia in relation to people-smuggling offences under the *Migration Act 1958* (Cth) - the appellants' assertion of a lack of a legislative purpose to increase sentences generally for the offences prescribed by s16AAB was contradicted by the Attorney-General's second reading speech - a note to note to s16A(1) that minimum penalties applied for certain offences, which referred to ss16AAA, 16AAB and 16AAC, did not support a lack of legislative intention to increase sentences - the exceptional circumstances in which a discount might lead to a sentence of imprisonment below the minimum prescribed sentence did not detract from the role of the minimum sentence as a yardstick - the principle of legality, which generally requires that a court be satisfied of a clear parliamentary intention before concluding that legislation abrogates common law rights, privileges or liberties, varies with the context in which it is applied - this principle had has some force against an interpretation that treated the prescribed minimum sentences as yardsticks leading generally to a greater average sentence and greater abrogation of liberty - but that limited force could not overcome the clear and unequivocal legislative intention - appeals dismissed.

Hurt

Executive Summary and (One Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al (NZSC) - Supreme Court of New Zealand rejects attempt to strike out claim in tort relating to damage caused by climate change. Court affirms that principles of Maori customary law (tikanga Maori) inform the common law of New Zealand

Summaries With Link (Five Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al [2024] NZSC 5
Supreme Court of New Zealand
Winkelmann CJ, Glazebrook, Ellen France, Williams, & Kos JJ
Mr Michael Smith as an elder and as a climate changes spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders, brought suit against Fonterra and other large New Zealand corporations that were engaged in mining or manufacturing. Seeking an injunction, he raised three tort causes of action: public nuisance, negligence, and a new tort - damage to the climate system. All three counts were stricken by the Court of Appeal. In reversing this decision, the Supreme Court examined both climate change as well as legal remedies available in New Zealand. The Court was very clear that it was appropriate for the traditional or customary Maori law (tikanga Maori) to be considered in formulating the common law of New Zealand. The Court accepted as indisputable that climate change threatens human well-being and planetary health and that the evidence was unequivocal that humans had warmed the atmosphere principally through the emission of Green House Gasses (GHG). The Court also reviewed treaty obligations and New Zealand's comprehensive legislation - the *Climate Change Response Act 2002* (NZ) (CCRA). Mr Smith alleged that the defendants were responsible for more than one-third of New Zealand's GHG emissions. Mr Smith relied on the principles of tikanga Maori that establish various obligations and relationships with respect to land, the environment and that a breach creates a hara (issue) requiring utu (compensatory action) to restore ea (a state of harmony). The relief sought for all of the causes of action was an injunction requiring the defendants to reduce net emissions annually under supervision of the Court to achieve zero-net emissions by 2050. After rejecting the defendants' claim that the tort claims were excluded by the CCRA, the Court engaged in a comprehensive review of the law of nuisance as it developed in New Zealand, the UK, Canada, and the USA, and found that the claim had evolved with the passage of time. However, to maintain a claim, the plaintiff must establish that the harm was a reasonably foreseeable consequence of defendant's conduct, and that the defendant's act must unreasonably interfere with public rights. The Court held that the standard required to strike out a claim had not been met and that Mr Smith was entitled to bring his case to trial

where he would have an opportunity to present full evidence. As to claims arising from climate change, the Court found that these were in principle in accord with traditional nuisance cases where one party contaminated a water course to the detriment of the public and private parties. The Court said, 'climate change engages comparable complexities [of proof], albeit at a quantum leap scale enlargement'. As to liability of a single party where multiple parties contribute to the harm, the Court stated that it was no defence to creating a nuisance that others were engaged in the same conduct - it is unnecessary that the defendant be the sole polluter, only that the defendant was a significant cause of the harm - all questions of fact. Relying on Canadian and American decisions, the Supreme Court adopted the view that everyone who contributes to a nuisance is liable providing that in the aggregate a nuisance is proven. The Supreme Court reinstated all three claims for trial where questions include: (1) whether New Zealand's law of public nuisance should sanction GHG emissions - And (2) whether the actions of the corporate respondents amounted to a substantial and unreasonable interference with public rights? The Court added that the likely legal battleground would involve: causation, substantiality, unreasonableness, and remedy. With respect to the nuisance cause of action, the Court concluded that the principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The Common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence. As the Court allowed the claim for nuisance to survive for trial, the Supreme Court declined to rule on the remaining claims for negligence and the proposed new climate change tort. The Court found that ruling on these claims was unnecessary because the same evidence supported all claims and that they all should go to trial where they could be fully developed. As to the effect of tikanga on the common law of tort, the Supreme Court rejected the Court of Appeal decision that the CCRA statutory scheme satisfied tikanga Maori. Instead, the Supreme Court held that the trial court must engage with tikanga because part of Mr Smith's loss is based on tikanga. The Court added that tikanga has been applied to common law tort actions since 1840. For example, the Court cited to a 2003 Court of Appeal decision affirming that Maori land rights derived from tikanga were cognisable at common law. The Court reiterated the continued vitality of tikanga in New Zealand: To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case. Inasmuch as the plaintiff Mr Smith is acting not only in individual capacity but also on behalf of traditional entities, the Supreme Court held that the trial court must consider tikanga concepts of loss that are neither physical nor economic.
Smith

Poem for Friday

Near Avalon

By: William Morris (1834-1896)

A ship with shields before the sun,
Six maidens round the mast,
A red-gold crown on every one,
A green gown on the last.

The fluttering green banners there
Are wrought with ladies' heads most fair,
And a portraiture of Guenevere
The middle of each sail doth bear.

A ship with sails before the wind,
And round the helm six knights,
Their heaumes are on, whereby, half blind,
They pass by many sights.

The tatter'd scarlet banners there
Right soon will leave the spear-heads bare.
Those six knights sorrowfully bear
In all their heaumes some yellow hair.

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