



Friday, 21 June 2024

Weekly Criminal Law

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

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Executive Summary

Carr v R (NSWCCA) - sentencing judge had failed to take offender's youth into consideration

Milky v The King (VSCA) - conviction set aside as the judge had directed the jury that, for the purposes of tendency reasoning, they could take into account misconduct evidence that had not been relied upon by the prosecution for tendency purposes, and had failed to give a *Jones v Dunkel* direction



HABEAS CANEM

Small dog, big surf



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Summaries With Link (Five Minute Read)

Carr v R [2024] NSWCCA 103

Court of Criminal Appeal of New South Wales

Ward P, Hamill, & Dhanji JJ

Sentencing - the applicant pled guilty to nine offences, including one aggravated break, enter and steal offence - he had been 19 years old at the time of the offending - he was sentenced to 10 years imprisonment with a non-parole period of 6 years and 3 months - he sought leave to appeal against sentence - held: the law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law - allowance will be made for an offender's youth and not just biological age - however, although of less significance than when sentencing adults, considerations of general deterrence and retribution cannot be completely ignored when sentencing young offenders - the emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders may be moderated when the young person has conducted himself in the way an adult might conduct himself and has committed a crime of violence or considerable gravity - the sentencing judge's references to the applicant's formative years and the impact of deprivation on young people could not be taken as a reference to the impact of the applicant's youth on the sentencing exercise - the sentencing judge's consideration of the applicant's age was limited to its relevance to the finding of special circumstances - however, the applicant's age was relevant at the stage of determining the length of the sentences themselves - the fact that the sentencing judge found the applicant's moral culpability was diminished as a result of the application of the *Bugmy* principles did not cure this error, as the same finding could be made in the context of a significantly older offender - simply labelling an offence as involving "adult behaviour", without further explanation, is unhelpful - leave to appeal granted, appeal allowed, and applicant resentenced to 7 years and 6 months imprisonment with a non-parole period of 4 years and 6 months.

[View Decision](#)

Milky v The King [2024] VSCA 136

Court of Appeal of Victoria

Emerton ACJ, Priest, & Kaye JJA

Tendency evidence and jury instructions - the applicant was a GP who was found guilty by a jury of sexual offending against six adult female patients that occurred while purporting to examine or treat the patients, including two counts of rape, four counts of indecent assault, eight counts of sexual assault, and one count of sexual assault by compelling sexual touching - the Crown had served a tendency notice giving notice that intended to adduce evidence of the applicant to act in a particular way, namely, (a) during consultations with female patients, to use his position as general practitioner to engage in touching or penetration which was sexual and not warranted by legitimate medical purpose, and (b) to do so in circumstances when there was a substantial risk of detection - he sought leave to appeal against both conviction and sentence - held: the judge directed the jury that, for the purposes of tendency reasoning, they could take

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into account misconduct evidence that had not been relied upon by the prosecution for tendency purposes - this evidence had been specifically relied upon by the prosecution merely as providing background and context - the judge's direction had been wrong - this error occasioned a substantial miscarriage of justice - context evidence is not admitted for the purpose of demonstrating a particular predisposition on the part of the accused person, but to put the particular allegations in the context of the whole of the relationship as described by the complainant - the purpose for which particular evidence is tendered is crucial to a determination of its admissibility and use - there must be a clear articulation of the manner in which asserted context evidence is relevant, so as to demonstrate that it does not involve tendency reasoning - the appeal should also succeed on the ground that the judge should have given the jury a *Jones v Dunkel* direction in respect of the Crown's failure to call certain staff members at the clinic where the alleged offending occurred, whose evidence would have been relevant to the claims made by two complainants - leave to appeal against conviction granted; appeal allowed; convictions set aside; and new trial ordered.

[Milky](#)

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine (SCOTUS) - Plaintiff pro-life doctors and medical associations challenged Food and Drug Administration (FDA) decision to relax prescribing restrictions on a drug used to terminate pregnancies. The Court held the plaintiffs lacked standing to challenge the FDA decision

Summaries With Link (Five Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine [2024] 602 US ____
Supreme Court of the United States

In 2021, the Food and Drug Administration (FDA) relaxed regulations for prescribing mifepristone, an abortion drug, to make the drug more accessible to women. The plaintiffs, consisting of pro-life doctors and medical associations, brought suit, alleging that the FDA regulations violated the *Administrative Procedure Act*. The District Court granted plaintiffs an injunction. The Court of Appeals found that plaintiffs had standing to sue and were likely to win on the merits. Reversing the lower courts, a unanimous Supreme Court held that the doctors and medical societies lacked standing to bring suit. Article III of the US Constitution limits the jurisdiction of federal courts to actual cases and controversies. The Court said that this is a matter of separation of powers. General complaints about how the government conducts its business are matters for the legislative and executive branches, not the judiciary. To establish standing, a plaintiff must demonstrate that (1) the plaintiff will likely suffer an injury in fact; (2) that the injury would likely be caused by the defendant; and (3) that the injury can be redressed by judicial relief. The plaintiffs are pro-life and do not prescribe the abortion drug. Nothing contained in the FDA regulations requires doctors to prescribe this drug. In short, the plaintiffs are acting to restrict the availability of the drug to others. While plaintiffs argued that they have suffered injury because doctors may suffer conscience objections when forced to perform abortions or perform abortion related treatment, the argument failed because federal conscience laws explicitly protect doctors from being required to perform abortions or other treatment that violates their consciences. The Court also rejected arguments that, if plaintiffs were not allowed to sue, then no one would have standing to challenge the FDA's actions. The Court said that even if this were true, it could not create standing and that some issues must be dealt with through the political and democratic processes and not the courts.

[Food and Drug Administration](#)

Poem for Friday

"Hope" is the thing with feathers (314)

By Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops - at all -

And sweetest - in the Gale - is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -

I've heard it in the chilliest land -
And on the strangest Sea -
Yet - never - in Extremity,
It asked a crumb - of me.

Emily Dickinson https://en.wikipedia.org/wiki/Emily_Dickinson

Emily Dickinson Museum https://en.wikipedia.org/wiki/Emily_Dickinson_Museum

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel,
Nazareth College

<https://www.youtube.com/watch?v=gDlSo4hEzmE>

Recitation by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada.

Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir

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Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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