

**SHORT PARTICULARS OF CASES**  
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**FEBRUARY 2025**

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## **CHERRY v STATE OF QUEENSLAND (B11/2024)**

Date writ of summons filed: 4 March 2024

Date special case referred to Full Court: 27 September 2024

In 2002, the plaintiff (“Cherry”) was convicted and sentenced in the Supreme Court of Queensland to two terms of life imprisonment with a mandatory non-parole period of 20 years for the murders of his wife and 17-year-old stepdaughter. His stepdaughter’s body was never located. On 8 November 2022, Cherry became eligible for parole. This proceeding raises the question of the validity of amendments made to the *Corrective Services Act 2006* (Qld) (“the CSA”) in 2021 by part 3 of the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld) (“the Amendment Act”), which inserted provisions to amend the existing ‘no body-no parole’ scheme and introduced a new ‘restricted prisoners’ regime to allow the Queensland Parole Board (“the parole board”) to make declarations affecting certain prisoners’ eligibility to apply for parole, and whether these schemes in effect unlawfully alter the punishment imposed by the court.

Pursuant to the inserted section 175C of the CSA, Cherry is a ‘no body-no parole prisoner’ as he is serving a period of imprisonment for a homicide offence and the body of his second victim has not been located. Under s 175L, the parole board is empowered to make a ‘no cooperation declaration’ in respect of a ‘no body-no parole prisoner’ if it is not satisfied that the prisoner has given satisfactory cooperation to identify the location of their victim’s remains. Such a declaration means that such a prisoner cannot apply for parole while the declaration is in force, and the parole board is required to refuse an application for parole until either it is satisfied that satisfactory cooperation has been given, or the prisoner ceases to be a ‘no body-no parole prisoner’.

The parole board was also further empowered under s 175E to make a ‘restricted prisoner’ declaration about a prisoner who is sentenced to life imprisonment for various offences, including more than one conviction of murder, if satisfied that it is in the public interest to do so. The consequence of such a declaration is that, while in force, a ‘restricted prisoner’ may not apply for parole (other than ‘exceptional circumstances parole’).

On 13 May 2022, after the Amendment Act came into operation, Cherry applied for release on parole. The parole board made a preliminary decision on 14 April 2023 that Cherry had not given satisfactory cooperation as to the location of his stepdaughter’s body and after public hearings, on 12 July 2023, the parole board made a ‘no cooperation declaration’ in respect of Cherry and, because of that declaration, refused his application for parole on 7 May 2024. While the ‘no cooperation declaration’ remains in force, Cherry is unable to apply for parole, although he may apply for reconsideration. No restricted prisoner declaration was made with respect to Cherry.

Cherry contends that the ‘no body-no parole’ and ‘restricted prisoners’ regimes are punitive and impermissibly grant judicial power to the executive by empowering executive authorities to make declarations that in effect alter the punishment imposed by a court, by depriving prisoners of the opportunity granted by a court order to be considered for release on parole, even after having served their mandatory minimum period of imprisonment for the purpose of imposing additional

punishment on that person. Cherry submits that the legislation infringes the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (“*Kable*”), in that it is repugnant to a ‘defining characteristic’ of the Supreme Court that punishments imposed by it after adjudicating on criminal guilt are final and conclusive, unless set aside on appeal.

The defendant rejects Cherry’s submission that such declarations are an exercise of judicial power and contends that determining whether a prisoner should be released on parole is a uniquely executive function. It submits that requiring Cherry to clear a hurdle before he may apply for parole does not contradict the non-parole period imposed by the court, or otherwise alter the punishment imposed, as the non-parole period ‘said nothing’ about whether Cherry would ever be released on parole. It contends that in any event, there is nothing impermissible about the exercise of judicial power by a State executive and that whether or not a power is judicial or nonjudicial in character is not determinative as to whether the *Kable* principle has been infringed.

The Attorneys-General for Victoria, New South Wales, the Northern Territory, Western Australia, and South Australia have intervened in support of the defendant.

Chief Justice Gageler ordered that the following questions of law in the form of a Special Case be referred for consideration by a Full Court:

- (a) Is s 175L of the CSA invalid because it enables the Queensland Executive to impermissibly interfere with the exercise of judicial power by State Courts, contrary to the principle established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?
- (b) Is s 175E of the CSA invalid because it enables the Queensland Executive to impermissibly interfere with the exercise of judicial power by State Courts, contrary to the principle established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51?
- (c) If the answer to Question (a) is “yes”, does s 193A of the CSA as in force before the commencement of the amendments made by pt 3 of the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (including omissions and substitutions) apply to the plaintiff?
- (d) Who should pay costs of the proceeding?

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**STATE OF NEW SOUTH WALES v WOJCIECHOWSKA & ORS**  
**(S39/2024)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2023] NSWCA 191

Date of judgment: 17 August 2023

Special leave granted: 7 March 2024

This proceeding concerns whether the New South Wales Civil and Administrative Tribunal (“the Tribunal”) has jurisdiction to determine an administrative review application made under the *Privacy and Personal Information Protection Act 1998* (NSW) (“the PPIP Act”), when the dispute is between a State and the resident of another State (falling within section 75(iv) of the *Constitution*) and the person seeks damages considering the limitation recognised in *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15 (“*Burns v Corbett*”), which prevents State tribunals (bodies which are not courts) from exercising judicial power with respect to matters in ss 75 and 76 of the *Constitution*.

The appellant is the State of New South Wales (“NSW”). The first respondent, resident in Tasmania, commenced various proceedings in the Tribunal (the second respondent), including seeking review of decisions made by the Commissioner of the NSW Police Force (the third respondent, “the Commissioner”) and the Secretary of the Department of Communities and Justice (the fourth respondent) under the *Government Information (Public Access) Act 2009* (NSW), in relation to her requests to access government and personal information. The first respondent sought damages from the Commissioner for alleged breaches pursuant to s 55(2)(a) of the PPIP Act and challenged the jurisdiction of the Tribunal to determine her applications. The matter was removed to the Court of Appeal of the Supreme Court of New South Wales to determine *inter alia* the question of whether the Tribunal exercises a judicial power under Part 5 of the PPIP Act.

The Court held that while many features of the Tribunal’s function pointed towards the powers in the PPIP Act being administrative, awarding damages for breach of legal duty was characteristically an exercise of judicial power. The Court noted that an order for damages under s 55(2)(a) would attract the statutory enforcement mechanism in s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW) (“the CAT Act”), allowing the Tribunal to issue a certificate which, if registered with a court, is enforceable as a judgment debt of that court. The Court held that as the Tribunal’s decision can be given the effect of a decision of a court, the determination of an application for damages brought by an out-of-state resident under s 55(2)(a) of the PPIP Act would involve the Tribunal exercising federal judicial power contrary to the restriction in *Burns v Corbett*.

In this appeal, NSW submits that the Tribunal’s review functions are not judicial and the power under s 55(2)(a) is not an essentially judicial power; instead, it takes administrative character from the Tribunal’s administrative review jurisdiction and is ultimately directed to the correct or preferable conduct in relation to the collection and handling of personal information. NSW contends that the Tribunal does not determine any ‘matter’ or quell any controversy under the PPIP Act. Rather, it says that where the Tribunal exercises the power under s 55(2)(a), that is simply a

decision by one part of government that it is appropriate for another part of government to make a payment to the applicant. Compensation under s 55(2)(a) is discretionary, and the ability to give discretionary compensation for loss suffered due to maladministration is a recognised part of the executive power. NSW also argues that s 78 of the CAT Act does not apply to orders made under s 55(2)(a), but that even if it did, the enforceability of such an order does not impart a judicial character to the function of the Tribunal.

The first respondent, who is self-represented, filed a cross-appeal and a notice of contention. She no longer presses the cross-appeal. The Court has appointed amici curiae who submit that the Court of Appeal's judgment did not turn solely on the effect of s 78 of the CAT Act and assert that the review that occurs in the context of an application under the PPIP Act is fundamentally different from typical administrative review. They contend that the Tribunal was exercising judicial power in respect of a 'matter', being the controversy between the parties as to whether the conduct of the agency breached legal duties arising under the PPIP Act.

The Attorneys-General for Victoria, Queensland, the Northern Territory, South Australia and Western Australia have intervened in support of NSW. The Attorney-General of the Commonwealth has intervened in support of the first respondent in relation to the appeal only.

The grounds of appeal are:

- The Court of Appeal erred in holding that the Tribunal exercises Commonwealth judicial power when performing a review of public sector agency conduct under Pt 5 of the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Administrative Decisions Review Act 1997* (NSW) at the instance of an out-of-State resident claiming damages:
  - (a) the Court erred in holding that an order of the Tribunal requiring a public sector agency to pay damages under s 55(2)(a) of the PPIP Act attracts the recovery mechanism in s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW);
  - (b) alternatively, the Court erred in holding that s 78 of the CAT Act imparted to the Tribunal's review function under the PPIP Act the character of an exercise of the judicial power of the Commonwealth. The Court should have held that the Tribunal's function did not involve the resolution of a "matter", such that any judicial character imparted to the Tribunal's orders by s 78 was not the judicial power of the Commonwealth;
  - (c) in partial support of (a) and (b), the Court erred in failing to characterise the Tribunal's function under the PPIP Act as non-judicial and, in this regard, erred in holding that, in making orders under s 55 of the PPIP Act, the Tribunal was not standing in the shoes of the public sector agency.

**BABET & ANOR v COMMONWEALTH OF AUSTRALIA (B73/2024);  
PALMER v COMMONWEALTH OF AUSTRALIA (B74/2024)**

Date writs of summons filed: 12 December 2024

Date special cases referred to Full Court: 14 January 2025

In December 2018, the United Australia Party (“UAP”) was registered as a political party under Part XI of the *Commonwealth Electoral Act 1918* (Cth) (“the Act”). Mr Clive Palmer is the UAP’s Chairman. Mr Neil Favager is the UAP’s National Director and is its “secretary” within the meaning of section 123 of the Act.

At the federal election held in May 2022, UAP member Mr Ralph Babet was endorsed by the UAP as its first-named candidate on the ballot paper for the Senate for the State of Victoria. After the UAP had received 147,330 first-preference votes “above the line” and Mr Babet had received 4,425 first-preference votes, Mr Babet was declared elected as a Senator for Victoria. His term as a Senator is set to expire on 30 June 2028 (absent a double dissolution under s 57 of the *Constitution*).

On 8 September 2022, the UAP was voluntarily deregistered under s 135 of the Act.

On or about 29 November 2024, Mr Babet and Mr Favager made an application to the Australian Electoral Commission (“AEC”) under s 126 of the Act for the registration of the UAP as a political party. On 20 December 2024, the AEC informed Mr Babet that the UAP was ineligible for registration until after the 2025 federal election, by virtue of s 135(3) of the Act. Section 135(3) relevantly provides that where a political party has been voluntarily deregistered it is ineligible for registration until after the general election next following the deregistration.

Mr Babet and Mr Favager together, and Mr Palmer separately, commenced proceedings in this Court, challenging the validity of s 135(3) of the Act on grounds including that the provision infringed the system of representative government required by ss 7 and 24 of the *Constitution* (Senators and Members of the House of Representatives to be chosen by the people), and that the provision impermissibly burdened the implied freedom of political communication that this Court has held to exist as an indispensable part of the system of responsible government created by the *Constitution*.

Special cases filed by the parties to both proceedings state the following questions of law, which Chief Justice Gageler referred for consideration by the Full Court:

1. Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impairs the direct choice by the people of Senators and Members of the House of Representatives, contrary to ss 7 and 24 of the *Constitution*?
2. Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impermissibly discriminates against candidates of
  - (i). a political party that has deregistered voluntarily; or
  - (ii). a Parliamentary party that has deregistered voluntarily?

3. Is s 135(3) of the Act invalid, in whole or in part, on the ground that it infringes the implied freedom of political communication?
4. In light of the answers to questions 1 to 3, what relief, if any, should issue.
5. Who should pay the costs of and incidental to this special case?

The Plaintiffs have filed a notice of a constitutional matter in each proceeding. The Attorney-General of New South Wales is intervening in the *Babet* proceeding.

## **KMD v CEO (DEPARTMENT OF HEALTH NT) & ORS (D2/2024)**

Court appealed from: Court of Criminal Appeal of the Northern Territory  
[2024] NTCCA 8

Date of judgment: 23 July 2024

Special leave granted: 10 October 2024

The appellant, KMD, was charged with eight offences arising out of events that occurred in Darwin on 7 May 2013. On 1 May 2014, Riley CJ declared KMD unfit to stand trial and that she was not likely to become fit to stand trial within a 12-month period, based upon the reports of three independent psychiatrists who each concluded that she suffered from a delusional disorder. Following those determinations, a special hearing was held, as required by section 43R(3) of the *Criminal Code 1983* (NT) (“the Criminal Code”). On 4 July 2014, following the special hearing, a jury found KMD not guilty by reason of mental impairment of the eight offences. On 4 July 2014, Riley CJ declared KMD liable to supervision, pursuant to s 43X(2)(a) of the Criminal Code and made an interim order, remanding KMD in custody until a supervision order was made. On 3 June 2015, Riley CJ imposed a custodial supervision order (“CSO”), pursuant to s 43Z of the Criminal Code.

Where a court makes a supervision order, an “appropriate person” must, at intervals of not more than 12 months during the period that the order is in force, prepare and submit to the court a report on the supervised person’s mental impairment, condition, or disability. After considering such a report, the court may conduct a review to determine whether the supervised person may be released from the supervision order (s 43ZK(1) of the Criminal Code). Section 43ZH(2) of the Criminal Code obliges the court to vary a CSO to a non-custodial supervision order (“NCSO”) unless satisfied on the available evidence that the safety of the supervised person or the public will be seriously at risk if the person is released on a NCSO. Hiley J conducted two reviews of KMD’s CSO (between May 2016 – July 2017 and November 2020 – March 2021), and on both occasions confirmed the existing CSO, having been satisfied that the safety of the public or KMD would be seriously at risk if KMD were released on a NCSO. This was partly because KMD had refused certain treatment, but fundamentally because KMD believes that she does not have a relevant mental illness.

The final review of KMD’s CSO was undertaken by Brownhill J. On 2 September 2022, Brownhill J concluded that the degree of likelihood that KMD would act on her delusional belief system in a violent way in the community to be low, but real rather than fanciful. Brownhill J found that in the circumstances, whether the safety of KMD or the public would be seriously at risk if KMD were released on a NCSO depended significantly upon the terms of any such order and the mechanisms in place to support KMD to live in the community in compliance with such terms. On 16 June 2023, following the filing of further expert reports and reports from other associated persons, Brownhill J confirmed her earlier finding that there is no risk that, if KMD were released, she would endanger herself (other than by way of response against KMD to any violent action she might take toward members of the public). Brownhill J was also not satisfied, on the balance of probabilities, that the safety of the public would be seriously at risk if KMD were released on a NCSO. Accordingly, on 5 July 2023 Brownhill J made orders revoking



KMD's CSO and placing her on a NCSO (with strict conditions attached), with effect from 12 July 2023.

The first respondent (CEO (Department of Health NT)), appealed under s 43ZB(2) of the Criminal Code to the Court of Criminal Appeal of the Northern Territory ("NTCCA") against the judgment of Brownhill J dated 5 July 2023, and sought orders that the NCSO be set aside and the previous CSO be confirmed. The majority of the NTCCA (Reeves and Burns JJ) began by examining the nature of an appeal under s 43ZB(2) and the appellate standard to be applied. Reeves and Burns JJ (Blokland J agreeing) determined the appeal was by way of rehearing and due to the legal criterion that fell to be applied, there was but one legally permissible answer available to the court, meaning the application of the "correctness standard" adopted in *Warren v Coombes* (1979) 142 CLR 531 was the appropriate appellate standard. The majority confirmed that under the provisions of s 43ZN(2), the primary Judge could not make an order releasing KMD from custody unless the primary Judge obtained and considered two reports prepared by separate psychiatrists or other experts, and also considered the earlier reports prepared for the initial determination of whether KMD should be subject to a CSO and the reports prepared for the subsequent reviews of the original order. The two reports were prepared by Professor Ogloff, a registered psychologist, and Ms Guy, a clinical social worker. KMD refused to be interviewed by Professor Ogloff for the purpose of the preparation of his report.

The majority noted that the purpose of obtaining reports was to enable the Court to be informed of KMD's current mental state and to enable the Court to make an assessment of the risk (if any) that KMD currently posed either to herself or the public. The majority concluded that KMD's refusal to be examined by Professor Ogloff and engage with other mental health practitioners in the years leading up to the review made it effectively impossible for the primary Judge to make a proper assessment of KMD's current mental state and any risk she may present to the public if she were released from custody. Ultimately, the majority opined that it was not reasonably open to Brownhill J to find that the safety of the public would not be seriously at risk if KMD were placed on an NCSO. Where the review miscarried by reason of KMD's conduct, the position regarding KMD's mental condition and risk assessment had not fundamentally changed since the reviews conducted by Hiley J. The majority was also satisfied that it was not reasonably open to Brownhill J to formulate a NCSO the terms of which did not provide for KMD to be the subject of monitoring and, at least, counselling on a regular basis by a psychiatrist and/or psychologist approved by the Forensic Mental Health Team. The NTCCA (Reeves and Burns JJ agreeing, Blokland J dissenting) upheld the appeal, set aside the NCSO made on 5 July 2023, and confirmed the previous CSO.

The grounds of appeal are:

1. The majority erred in applying the correctness standard; applying the *House v The King* standard, the NTCCA should have dismissed the appeal.
2. The majority erred by ordering that the CSO be confirmed, without first providing KMD a further hearing or opportunity to adduce evidence relevant to risk based on the year she had spent in the community on the NCSO, in circumstances where the conduct of the appeal gave rise to a reasonable expectation by KMD that, if the NTCCA found error, she would be afforded a further hearing before final orders were made.

3. Alternatively, the majority erred by ordering that the CSO be confirmed without any evidence relevant to risk arising from KMD's year in the community.
4. The majority erred by holding that the primary judge's periodic review "miscarried" because KMD refused to engage with one of the persons who prepared a report under s 43ZN(2)(a)(i) of the Criminal Code, and by allowing that holding to influence its treatment of the evidence, where s 43ZN(2)(a)(i) required only that her Honour obtain and consider two such reports.

**FORESTRY CORPORATION OF NEW SOUTH WALES v**  
**SOUTH EAST FOREST RESCUE INCORPORATED INC9894030**  
**(S120/2024)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2024] NSWCA 113

Date of judgment: 16 May 2024

Special leave granted: 5 September 2024

In January 2024, the Respondent, whose objectives broadly concern the protection of native forests from logging, commenced civil enforcement proceedings in the Land and Environment Court of New South Wales, alleging non-compliance by the Appellant with a condition of an Integrated Forestry Operations Approval (“IFOA”) that required a “broad area habitat search” for certain features of the habitat of three species of glider. Two of those species are listed as vulnerable, and one is listed as endangered, in Schedule 1 to the *Biodiversity Conservation Act 2016* (NSW) (“the BC Act”).

Requirements for IFOAs and their enforcement are prescribed in Part 5B of the *Forestry Act 2012* (NSW) (“the Forestry Act”). Section 69SB(1) therein provides that the Environmental Protection Authority (“the EPA”) has the function of enforcing compliance with IFOAs, while s 69ZA relevantly limits the use of “open standing” provisions, which otherwise would enable third parties to sue for an apprehended breach of an IFOA, to the EPA and certain government officials. Section 13.14A(1) of the BC Act provides that the EPA may bring proceedings for an order to remedy or restrain a breach of Part 5B of the Forestry Act.

On 8 February 2024, Pritchard J dismissed the proceedings, after finding that the Respondent lacked standing to bring them. Her Honour held that, although the relevant provisions of the Forestry Act and the BC Act in respect of standing did not oust a third party’s right under the common law to bring civil enforcement proceedings, the Respondent lacked the requisite “special interest” in the subject matter. This was because the Respondent had been formed with the aim of ending logging rather than protecting gliders, such latter concern having manifested only recently, and it had sought relief in relation to operations outside its usual geographical area of concern.

An appeal by the Respondent was unanimously allowed by the Court of Appeal (Adamson JA, Basten and Griffiths AJJA). Their Honours held that the principles of standing at common law had not been ousted by the statutory scheme under consideration, as the relevant provisions addressed statutory open standing and did not express with irresistible clearness an intention to abrogate the principles of common law standing. The Court of Appeal proceeded to find that the Respondent did satisfy the criterion of having a special interest in the subject matter so as to have standing to bring the civil enforcement proceedings. This was in circumstances where the Respondent had become actively involved in surveys and reports on endangered gliders only in 2023, but had a long history of taking active steps in relation to its deep concern over logging and the effects thereof on the welfare of forest-dependent threatened species, which since 2010 had included representations in relation to vulnerable and endangered species of glider.

Their Honours found it insignificant that the civil enforcement proceedings related to areas in northern New South Wales and not the Respondent's historical area of concern, the state's south-east.

The sole ground of appeal is:

- The Court of Appeal erred in concluding that, on the proper construction of the *Forestry Act 2012* (NSW) and the *Biodiversity Conservation Act 2016* (NSW), private persons or entities have standing to bring civil enforcement proceedings in relation to alleged breaches of an integrated forestry operations agreement.

## **DZY (A PSEUDONYM) v TRUSTEES OF THE CHRISTIAN BROTHERS (M81/2024)**

Court appealed from: Supreme Court of Victoria Court of Appeal  
[2024] VSCA 73

Date of judgment: 23 April 2024

Special leave granted: 5 September 2024

The appellant (“DZY”) commenced a proceeding in 2021 seeking damages for personal injuries and economic loss he alleges was caused by sexual abuse committed by two Christian Brothers when he was a school student in the 1960s. In their defence, the respondent relied on the terms of two settlement deeds (“Deeds”) entered into with DZY in 2012 and 2015 as a bar to his cause of action.

The Deeds contained an acknowledgement that DZY made no claim for economic loss and an express term that the respondent could rely on the Deeds as a bar to any further claim for damages arising out of the alleged assaults. DZY was legally represented when he entered the Deeds and there was evidence that he received advice at the time not to pursue a claim for economic loss as this would mean that he might have to repay social security benefits. At the time of executing the first deed, DZY would have faced two impediments to pursuing any claim for damages; firstly, his claim would have been statute barred under the *Limitation of Actions Act 1958* (Vic) (“LAA”), and secondly, there would have been no realistically viable defendant against which DZY could make a claim against due to the ‘*Ellis* defence’ (per *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565), which prevented proceedings being brought against unincorporated church entities.

In 2015, the LAA was amended to remove the limitation period for personal injury actions found on child abuse, and then in 2019, further amended to permit a cause of action to be brought on a previously settled cause of action and to allow a plaintiff to make application to set aside prior settlements. In addition, in 2018, legislation came into force to overcome the *Ellis* defence and allow for the nomination of an entity to act as a proper defendant to a claim against an unincorporated entity, to remove some of the barriers facing plaintiffs in historic child abuse cases.

DZY made an application under section 27QE of the LAA to set aside the Deeds. This section provides *inter alia* that a court, if satisfied that it is just and reasonable to do so, may make an order to set aside a settlement agreement, whether wholly or in part. The respondent submitted that the Court should only set aside the part of the Deeds which would allow DZY to continue his claim for general damages, but sought to maintain the effect of the Deeds insofar as they barred his claim for economic loss. The respondent contended that in circumstances where a plaintiff’s motivations to settle are influenced by factors not directly connected to the limitations and/or *Ellis* defence (in this case a potential social security repayment), the Court should not be satisfied that it is just and reasonable to set aside the prior settlement.

The primary judge ordered that it was just and reasonable to set aside the Deeds in their entirety without distinction as to their operation in respect of the two heads of loss and damage. The respondent appealed this decision.

The Court of Appeal (Beach, Macaulay and Lyons JJA) unanimously held that the nature of the power to set aside settlement agreements under s 27QE is not discretionary and that any appellate review of a decision is to be approached on the “correctness standard”;<sup>1</sup> that is, it is either just and reasonable that the parties should not be bound by a previous settlement, or it is not. Beach and Macaulay JJA (the “majority”) considered the particular ‘mischief’ s 27QE was designed to remedy, namely the two legal barriers facing plaintiffs in child abuse cases (being the limitations and *Ellis* defence) and the importance of the integrity of the adversarial legal system of adherence to judgments and settlements. They held that the actual influence of one (or both) of these legal barriers is central in the consideration of whether it is just and reasonable to set aside a settlement agreement. Lyons JJA agreed with the outcome reached by the majority, but disagreed that it was necessary to conclude that the claimant needs to establish that either of the previous legal barriers had a ‘material’ impact on the claimant’s decision to settle their claim, or that either was a ‘leading’ factor before the court can exercise the power under s 27QE; rather, the exercise of the power depends upon all of the relevant circumstances.

The Court of Appeal determined that it was just and reasonable to only set aside the Deeds insofar as they barred a claim for general damages, as on the majority’s assessment of the facts there was no positive finding that DZY’s decision not to pursue an economic loss claim was materially influenced by the existence and impact of the limitations and *Ellis* defences, but rather his apprehension that he would have to repay his social security benefits.

DZY sought special leave to appeal on various grounds, but the High Court granted special leave to appeal limited to two grounds.

The grounds of appeal are:

- The Court of Appeal majority (Beach and Macaulay JJA) erred in finding that the power provided in s 27QE(1) of the *Limitation of Actions Act 1958 (Vic)* is not enlivened unless a claimant establishes that the Limitation Defence and/or the *Ellis* Defence had a ‘material impact’ on, or was a ‘leading’ factor in, the claimant’s decision to settle.
- The Court of Appeal, in finding the judgment below was in error, misapplied the correctness standard.

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<sup>1</sup> As per the High Court’s decision in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32, which considered the issue of a permanent stay in the context of the New South Wales equivalent of the LAA.

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**THE KING v RYAN CHURCHILL (A PSEUDONYM) (M94/2024)**

Court appealed from: Supreme Court of Victoria Court of Appeal  
[2024] VSCA 151

Date of judgment: 28 June 2024

Special leave granted: 7 November 2024

The respondent was charged with two counts of incest contrary to section 44(2) of the *Crimes Act 1958* (Vic), as amended by the *Crimes (Sexual Offences) Act 1991* (Vic). Both charges relate to a single complainant, one of the respondent's stepdaughters. On 12 September 2022, the respondent was found guilty in respect of both charges. On 7 March 2023, the respondent was sentenced to 8 years and 6 months imprisonment, with a non-parole period of 5 years. The respondent sought leave to appeal against his conviction in respect of both charges to the Supreme Court of Victoria Court of Appeal ("VSCA"). On 28 June 2024, the VSCA granted the respondent leave to appeal on proposed ground 1 and allowed the appeal. The respondent's convictions and sentence were set aside, and a retrial was ordered.

Proposed ground 1 in the VSCA provided that the trial miscarried by reason of the use the jury was invited to make of evidence of the complainant's distress and the directions given in relation to it. The complainant's mother, Ms Russo (a pseudonym), gave evidence that while at a Children's Court hearing in late 2006 or early 2007, approximately 12 months after the respondent's alleged offending, the complainant had a "meltdown" and told Ms Russo that the respondent had "raped" her. The complainant was "yelling" and "very upset, very, very distressed" when telling this to Ms Russo. The complainant's evidence was that she did not recall telling her mother of the alleged offending at the Children's Court, but gave evidence about circumstances surrounding the events at the Children's Court. She also gave evidence that she only ever told people about the alleged offending "in the midst of meltdowns" and at the time she was telling her mother at the Children's Court that she had been raped, she was having a meltdown.

Following final addresses, the judge thought it appropriate to give a circumstantial evidence direction and said that he would use the evidence of the complainant's distress at the time of her meltdown at the Children's Court as "a concrete example as to the manner in which indirect evidence should be approached". The judge dealt with the evidence of the complainant's meltdown as part of the directions he gave about direct evidence and evidence which was capable of proving a fact indirectly ("the first passage"). Later in his charge, the judge gave directions about the use the jury could make of the evidence of the complainant telling her mother, at the Children's Court, of being raped by the respondent ("the second passage").

The VSCA noted that in the first passage, the judge directed the jury that it was open to them to use the evidence of the complainant's distress at the Children's Court as indirect evidence, supportive of the complainant's direct evidence that she had been raped by the respondent. The judge also directed the jury that, although it was often believed that indirect evidence is weaker than direct evidence, "that is not the case", and that indirect evidence "can be just as strong or even stronger". The VSCA determined that the judge's direction in the second passage was concerned solely with the evidence of the complaint itself, not with any distress exhibited by the complainant when she made the complaint.

Accordingly, the second passage did not qualify or eliminate the effect of the first passage.

The VSCA concluded that on any view, the causal link between the respondent's alleged offending and the distress exhibited by the complainant at the Children's Court was a weak one. Further, if a distress direction of the kind given by the judge was to be given, it required the judge to do more than explain the arguments put by the prosecutor and defence counsel about what had caused the complainant's observed distress, as part of a direction about evidence capable of proving a fact indirectly. It required more than the general warning the trial judge gave about "drawing conclusions from indirect evidence of that kind". It required the trial judge to direct the jury specifically about the need for the jury to be satisfied that there was a rational causal link between the distress and the alleged offending, and also warn the jury of the fact that distress evidence generally carries little weight. The VSCA concluded that the failure to give these directions occasioned a substantial miscarriage of justice. On the evidence given at trial, there were substantial and compelling reasons for giving directions of the kind described. It is for that reason that the VSCA concluded that there must be a retrial.

The grounds of appeal are:

1. The Court below erred in holding that when evidence of a complaint is admitted in a criminal trial for a sexual offence pursuant to s 66 of the *Evidence Act 2008* (Vic), and the complaint witness gives evidence of the complainant's distressed demeanour at the time of making the complaint, the evidence of distress is evidence of a kind that "generally carries little weight" and a trial judge is required to so warn the jury.
2. The Court below erred in holding that a substantial miscarriage of justice had been occasioned because the trial judge did not specifically direct the jury:
  - (a) that they could not use evidence of distress as support for the charges unless they first found a rational causal link between the distress and the alleged offending; and
  - (b) that evidence of distress generally carries little weight.

The respondent filed a notice of contention on 21 November 2024, raising the following ground:

1. The Court of Appeal of the Supreme Court of Victoria failed to hold that the respondent's trial miscarried by reason of the use the jury was invited to make of evidence of the complainant's "distress" at the Children's Court in late 2006 or 2007. The Court of Appeal ought to have decided that it was not open to the jury acting reasonably to use the complainant's "meltdown" at the Children's Court as circumstantial evidence of distress that was "indicative of the trauma of having been sexually penetrated by the accused."