SHORT PARTICULARS OF CASES
APPEALS

JUNE 2025

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MICHAEL STEWART BY HIS LITIGATION GUARDIAN CAROL SCHWARZMAN v METRO NORTH HOSPITAL AND HEALTH SERVICE (ABN 184 996 277 942) (B10/2025)

Court appealed from: Supreme Court of Queensland Court of Appeal [2024] QCA 225

Date of judgment: 15 November 2024

Special leave granted: 6 March 2025

In 2016 the appellant, then aged sixty-three, suffered personal injuries, including brain damage, hemiparesis, confusion, severe expressive and receptive aphasia, and dysphasia, which impairs his ability to comprehend and produce language, as a consequence of his treatment at a hospital operated by the respondent. As a result of his injuries, he has been living in an aged care facility ("Ozanam") since March 2017.

The respondent admitted negligence and the issue at trial in the Supreme Court of Queensland was the assessment of damages, including whether the assessment of his future care should be calculated on the basis that he would live independently, rather than in a care facility. The appellant contended that it was reasonably necessary for him to be cared for in his own home and that his quality of life would be substantially improved were he to do so, as he would be able to spend more time with his family and keep a dog, which would improve his overall health.

Evidence was led that the appellant was unhappy in care and had, within his ability to, communicated a desire to live in his own home; however, due to his cognitive deficits, the primary judge found that he did not have a full understanding of the challenges involved and what that would mean for his future care. The primary judge applied *Sharman v Evans* (1977) 138 CLR 563 in deciding what was reasonable by balancing the costs against the benefits to the health of the appellant and held that, considering the comparative costs of the two alternatives, residing in his own home would not likely result in health benefits that were significantly better than those likely to be achieved from receiving additional care in a care facility.

The appellant appealed the primary judge's decision to the Court of Appeal, contending that the primary judge erred by failing to have regard to the health benefits to be afforded by obtaining treatment whilst living independently, and the evidence that the health benefits afforded by treatment at home were greater than the benefits of additional care in a care facility.

The Court of Appeal (Boddice JA with Mullins P and Ryan J agreeing) dismissed the appeal, finding that there was no error in the primary judge's factual finding that the health benefits derived from the provision of additional care was able to be derived equally at a care facility, nor the primary judge's conclusion that it had not been established that living with his son and a dog in his own home was likely to result in significantly better health benefits. Boddice JA cited *Sharman v Evans,* stating that while cost is not a sufficient ground alone, if the cost is great and the benefits to health are slight or speculative, awarding the costs of such treatment would be unreasonable. His Honour concluded that once the health benefit was substantially the same, the cost difference between the two alternatives was a proper factor in assessing reasonableness.

In this appeal, the appellant contends that *Sharman v Evans* is a problematic application of the 'paramount principle' recognised by the common law, in that a plaintiff who has been injured by the negligence of another should be awarded such a sum of money that will, as nearly as possible, put them in the same position as if they had not sustained the injuries. He says *Sharman v Evans* reflects historical community standards and values, and that it is wrong for this case to be cited as an authority to support the proposition that an award of damages should be diminished on the basis that the cost of providing care based on a reasonable choice by a plaintiff as to where they wished to live was perceived to be excessive. The appellant instead says that the Court should take an approach that recognises changing community values, standards, and expectations, and highlights that in the decades after *Sharman v Evans*, courts have considered medical evidence that institutionalised care in some circumstances should be regarded as an option of last resort. The appellant says that the failure to consider the reasonableness of the appellant's desire to live in the community, or the fact that such community care arrangements are common, was an error.

The respondent submits that, properly understood, *Sharman v Evans* provides common sense guidance to the assessment of reasonableness as a 'reality check' of the proposed living arrangement, and its purpose is not to identify the ideal, but instead the reasonable requirements of a plaintiff. It says what is reasonable is a question of fact, and contends that it was open on the evidence to find that it was not reasonable for the respondent to pay the significant additional cost for the appellant to reside and receive care and therapy in an unidentified private rental property instead of Ozanam.

The appellant sought special leave to appeal on three grounds and was granted special leave to appeal on the sole ground that:

- The Court of Appeal (CA) erred at {CA[88] to [95]} in finding that the trial judge did not err in failing to award the appellant an amount of damages that permitted him to live in his own home in that in determining whether it was reasonable for the respondent to pay the additional costs of therapy in the appellant's own residence as opposed to the provision of additional therapy and care in the nursing home in which the appellant resided, the CA should have taken into account that the appellant had lived in the community prior to sustaining his injuries, his expressed wish to live in the community, his unhappiness living in Ozanam, the enhancements to his life of sharing his residence with his son and a dog and that the living, care and therapy arrangements sought by the appellant were of a kind commonly undertaken in the community.

R LAWYERS v MR DAILY & ANOR (A8/2025)

Court appealed from: Full Court of the Federal Circuit and Family Court of Australia (Division 1) Appellate Jurisdiction

Date of judgment: 17 October 2024

Special leave granted: 6 March 2025

The appellant is a law firm. Shortly before they married in 2005, the appellant provided legal advice to the first respondent ("husband") in the drafting and negotiation of a financial agreement ("the agreement") between him and the second respondent ("wife"). The purpose of the agreement was to agree in advance how the husband and wife's property would be divided in the event of separation, and therefore prevent a property adjustment order under the *Family Law Act 1975* (Cth).

The husband and wife separated in 2018, and in 2019 the wife applied to the Family Court to have the agreement set aside. In 2020, the agreement was set aside on the ground of hardship, however this decision was overturned on appeal and the issue of whether the agreement was potentially void for uncertainty was raised. In May 2021, the husband joined the appellant to the proceeding, alleging that in the event the agreement was not binding, then the appellant had breached its retainer and was negligent for failing to advise the husband that the agreement lacked certainty. The husband sought damages from the appellant on the basis that if the agreement was not binding, then he would be liable to pay more to his wife than was agreed in the agreement.

The appellant denied negligence but also relied upon section 35 of the *Limitation of Actions Act 1936* (SA), which provides that any cause of action in contract or tort must be commenced within six years after the cause of action accrued. It submitted that as the husband only joined the appellant to the proceeding in 2021, he was statute-barred as this was more than six years after the marriage and the entry into the agreement in 2005. The husband sought an extension of time but also contended that he was not statute-barred, as he had joined the appellant to the proceeding less than six years after his separation in 2018. The primary judge found that the agreement was void for uncertainty, set it aside, and made property settlement orders. The primary judge also held that the appellant was negligent, and that the husband's negligence claim was not statute-barred as, at the earliest, the husband sustained actual damage at the date of the separation in 2018.

The husband appealed to the Full Court (Aldridge, Tree and Campton JJ) and the appellant cross-appealed, challenging the primary judge's finding that it was negligent and the award of damages on the basis that the claim was statute-barred. In relation to the cross-appeal, the Full Court considered that there were two competing characterisations of when damage is first sustained in cases of a negligently drawn contract. Either the defective contract is characterised as a 'damaged asset' and the loss is suffered immediately (*Orwin v Rickards* [2020] VSCA 225 ("*Orwin*")), or as per *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 ("*Wardley*"), the loss is regarded as merely contingent until events trigger it. The Full Court held that the primary judge was bound by the characterisation in *Wardley* and allowed the husband's appeal in part and dismissed the appellant's cross-appeal.

The issue in this appeal is when the husband's cause of action for negligence accrued. The appellant submits that damage was sustained when the contract was entered into because the agreement did not at that time prevent the application of the *Family Law Act 1975* (Cth), and that the primary judge should have found that the husband had not discharged his onus of establishing a basis for an extension of time to institute a proceeding. The appellant says that, contrary to the Full Court's reasoning, there are not two competing approaches to the question of when a cause of action accrues against a solicitor in respect of a negligently drawn contract; rather, a client suffers damage when the contract is entered into because at that point in time, they receive less than they should have received under the agreement, regardless of if there is a chance of further loss flowing from the same negligence. The appellant further submits that *Wardley* does not establish a rule of general application as the nature of the interest infringed in that case was different and does not detract from their proposition.

The husband submits that the agreement was not a tangible or intangible asset, and his loss was purely contingent upon separation, before which time, his loss did not exist and was therefore incalculable, and that this is consistent with the decision in *Wardley*. At the time of entering into the agreement, the husband says no rights or liabilities were imposed upon him and the entire effect of the agreement was purely conditional upon separation. He contends that the Full Court properly applied *Wardley,* and that *Orwin* is not binding and is contrary to the approach taken in *Wardley*, and therefore ought to be disregarded.

The wife has entered a submitting appearance.

The grounds of appeal are:

- The Full Court erred in determining (at FC [75]) that there are two competing characterisations in the decided cases, including *Wardley*, of when a negligently drawn contract first sees damage sustained. The Full Court should have found that *Wardley* was not a case of a negligently drawn contract and that, on the authorities, if a party to a contract has received less than they should have done as a result of their solicitor not performing their duty, damage is sustained when the contract is entered into.

- The Full Court erred in accepting (at FC [72]-[90]) the primary judge's determination, and so finding, that no loss or damage was sustained by the first respondent (husband) until, at the earliest, the date of separation, such that the husband's claim against the appellant was not statute-barred. The Full Court should have found that loss and damage was sustained by the husband upon entry into the defective contract.

PALMANOVA PTY LTD v COMMONWEALTH OF AUSTRALIA (S147/2024)

Court appealed from: Full Court of the Federal Court of Australia [2024] FCAFC 90

Date of judgment: 5 July 2024

Special leave granted: 7 November 2024

A certain archaeological artefact ("the Artefact") found at the site of the ancient city of Tiwanaku, located in present-day Bolivia, came to be removed from Bolivia sometime between 1934 and the 1950s, when such removal was illegal under Bolivian law. In June 2020, the Artefact arrived in Australia, following its purchase by the appellant from a gallery in the United States of America. Upon its arrival in Australia, the Artefact was intercepted and retained by officials under the *Customs Act 1901* (Cth). Subsequently, the Artefact was seized by an inspector under section 34 of the *Protection of Movable Cultural Heritage Act 1986* (Cth) ("the Act"), in the belief that the Artefact was liable to forfeiture under the Act.

The Act commenced on 1 July 1987. Section 14(1) of the Act provides as follows:

(1) Where:

(a) a protected object of a foreign country has been exported from that country;

(b) the export was prohibited by a law of that country relating to cultural property; and

(c) the object is imported;

the object is liable to forfeiture.

Section 14(2) then provides, in essence, that a person who imports an object knowing that it is protected and has been exported from a country in contravention of a law of that country relating to cultural property commits an offence.

In June 2021, the appellant commenced proceedings against the respondent under s 37 of the Act, seeking recovery of the Artefact on the ground that it was not liable to forfeiture under the Act.

On 4 December 2023, Perram J declared that the Artefact was not liable to forfeiture under s 14(1) of the Act and ordered that the respondent return the Artefact to the appellant. His Honour had recourse to extrinsic material, as the meaning of s 14(1) was not clear. Perram J considered that the use of the present perfect tense ("has been exported") in s 14(1)(a) indicated an intention by Parliament that the completion of the past event have some relevance to the present. His Honour held that s 14(1) applied to a protected object only if the act of exportation occurred on or after 1 July 1987, or was sufficiently connected with the importation that both acts together constituted a transfer of the object (such connection not being present in this case).

An appeal by the respondent was allowed by the Full Court of the Federal Court (Banks-Smith and Abraham JJ; Downes J dissenting). Banks-Smith and Abraham JJ held that it was unnecessary to consider extrinsic material in construing s 14(1) of the Act. Their Honours found that the focus of s 14(1) was that an object *is* protected rather than its having been exported, and that s 14 must be considered in the context of an object having been imported into Australia. Section 14(2), which was plainly relevant and with which s 14(1) was to be construed consistently, was directed to an importer's knowledge of the character of the object at the time of import. In view of the context and purpose of s 14(1), the text of that provision provided no basis for limiting the application of s 14(1) to exports after the enactment of the Act.

Downes J, however, would have dismissed the appeal. Her Honour held that, although Perram J had not erred by having regard to extrinsic material, his Honour had erred by finding that the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* opened for signature 14 November 1970 (823 UNTS 231) was of no assistance. Downes J found that relevant provisions of the Convention supported his Honour's construction of s 14(1)(a), which construction was correct.

The grounds of appeal include:

- The majority erred in the interpretation of s 14(1) of the Act by concluding that:

  (a) the Act is not limited in its application to a protected object of a foreign country that has been exported from that country after the date of commencement of the Act (1 July 1987); and, on that basis

  (b) the Act rendered liable to forfeiture a protected object of Bolivia that was exported from Bolivia prior to 1 July 1987.

- The majority erred by concluding that the construction of s 14 of the Act was clear such that it was unnecessary to consider extrinsic material.

PLAINTIFF S22/2025 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS (S22/2025)

Date application for a constitutional or other writ filed: 21 February 2025

Date special case referred to Full Court: 22 May 2025

The plaintiff is a 65-year-old citizen of Iraq with limited English skills who has been diagnosed with post-traumatic stress disorder. The plaintiff arrived in Australia in July 2012 and was eventually granted a temporary protection visa ("TPV") in October 2015. Prior to the expiry of the TPV, the plaintiff applied for a Safe Haven Enterprise Visa ("SHEV", later converted to an application for a Resolution of Status visa by operation of regulation 2.08G of the *Migration Regulations 1994* (Cth) ("the Regulations")). The parties agree that the defendant's delegate made a protection finding within the meaning of section 197C(5)(a) of the *Migration Act 1958* (Cth) ("the Act") regarding the TPV application, but the defendant disagrees with the plaintiff regarding the SHEV application, and says that no such protection finding was made.

In June 2022, the plaintiff was convicted of the offence of "specially aggravated detaining of a person for advantage" and was sentenced to imprisonment for over five years. Subsequently, the plaintiff's TPV was mandatorily cancelled under s 501(3A) of the Act ("the Cancellation Decision") for failing to pass the character test. On 21 March 2023, the plaintiff was given notice of the Cancellation Decision. As a consequence of the Cancellation Decision, the plaintiff's pending application for a SHEV was taken to be refused by operation of s 501F of the Act.

On 17 April 2023, while serving his custodial sentence, the plaintiff filled out a form to request revocation of the Cancellation Decision, which was supplemented by an additional character statement submitted on his behalf in February 2024. Although the defendant has no record of receiving the revocation request in April 2023, the plaintiff's case was referred to the "NZYQ Case Coordination" by March 2024, and he was subsequently released on parole and detained in immigration detention. In July 2024, the defendant's delegate sent written confirmation to the plaintiff that it would consider the plaintiff's representations about revocation of the Cancellation Decision. On 24 October 2024, the defendant's delegate made the decision not to revoke the Cancellation Decision ("the Non-revocation Decision"). On the same day, the plaintiff was granted a bridging visa under reg 2.25AB of the Regulations ("BVR")[1]. In February 2025, the plaintiff received notice of the cessation of his BVR and intention to be removed from Australia. The plaintiff was scheduled to be removed to Nauru on 24 February 2025. However, this has not taken place, pending the hearing and determination of this application.

The plaintiff has filed an application in this Court seeking relief in the form of the issue of writs of certiorari and mandamus quashing the Non-revocation Decision, and to have the defendant make a decision under s 501CA(4) of the Act whether to revoke the Non-revocation Decision according to law. The plaintiff also requires an extension of time to make the application.

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[1] The BVR is a new visa mechanism introduced after the High Court's orders in *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 for when there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future, without the person making an application for the visa.

The plaintiff contends that due to his limited English comprehension, immigration detention, lack of legal representation and the manner of communication at the time he was provided the Non-revocation Decision, he was unable to comprehend the precise outcome of the Non-revocation Decision and its implication on any visa application and status.

The plaintiff raises three grounds of review – 1) the delegate misapprehended or failed to consider the legal consequences of the decision that the plaintiff be released from immigration detention and that the defendant would separately consider the type of visa and conditions to be imposed; 2) the delegate failed to comply with Ministerial Direction 110 (direction for visa refusal and cancellation having regard to the character test and the Australian community) and so failed to comply with s 499(2A) of the Act; and 3) the delegate denied the plaintiff procedural fairness and/or proceeded in a legally unreasonable way by taking into account information given to the plaintiff that was privileged and confidential.

The defendant contends that there are no grounds that give rise to a jurisdictional error and submits that 1) even if it is accepted that the delegate was required to consider "direct and immediate statutorily prescribed consequences" of the exercise of power under s 501CA(4), no error is demonstrated from the delegate's reasoning for the plaintiff to be released from immigration detention and for the defendant to separately consider the type and conditions of a visa; 2) the cancellation of the TPV (being the substantive visa), even if the plaintiff was placed on a BVR, is consistent with the community's expectation of which non-citizens should be allowed to enter or remain in Australia; and 3) the delegate was entitled to rely on a "Merit Advice" of counsel which was provided to the delegate by the plaintiff, and the delegate was not on notice that the Merit Advice had been handed over accidentally. Even if the delegate was on notice, the plaintiff has not established any jurisdictional error merely by the delegate having regard to material which, on its face, appears to be privileged.

While the defendant states that the delay for the plaintiff making this application is not inordinate, nor has he suffered any prejudice, the defendant opposes the extension of time on the bases that the plaintiff's explanation about his understanding of his visa status is implausible given the conditions imposed on the BVR which did not attach to a TPV, and that there is no merit to the plaintiff's proposed grounds of review to warrant the extension.

Justice Edelman granted the parties leave to state the following questions of law in the form of a special case, for the opinion of the Full Court:

1) Should an extension of time be granted under s 486A of the Act for the filing of the application for a constitutional or other writ?

2) Is the non-revocation decision affected by jurisdictional error on the basis that the delegate, in addressing the legal consequences of the decision:

    a. misapprehended or failed to consider the legal consequences of the decision; and/or

    b. reasoned in a way that was legally unreasonable?

3) Is the non-revocation decision affected by jurisdictional error on the basis that the delegate failed to comply with Ministerial Direction 110, and so failed to comply with s 499(2A) of the Act, in the consideration of the expectations of the community?

4) Is the non-revocation decision affected by jurisdictional error on the basis that the delegate:

   a. denied the plaintiff procedural fairness; and/or

   b. proceeded in a legally unreasonable manner,

   by taking into account legal advice given to the plaintiff, without notice to the plaintiff?

5) What relief, if any, should be granted to the plaintiff?

6) Who should pay the costs of the proceeding?