SHORT PARTICULARS OF CASES
APPEALS

COMMENCING WEDNESDAY, 3 APRIL 2013

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DIRECTOR OF PUBLIC PROSECUTIONS (CTH) v KEATING (M5/2013)

Court from which removal was sought: Magistrates' Court of Victoria

Date cause removed: 14 December 2012

Date Case Stated referred to Full Court: 19 December 2012

On 7 October 2010 the defendant was charged with three counts of obtaining financial advantage contrary to s 135.2(1) of the *Commonwealth Criminal Code*. It is alleged that between May 2007 and September 2009 the defendant failed to inform Centrelink of increases in her income, as a consequence of which she knowingly received a social security benefit greater than that to which she was entitled.

On 4 August 2011, assent was given to the *Social Security and Other Legislation (Miscellaneous Measures) Act* 2011(Cth) ("the amending Act"), which introduced s66A into the *Social Security (Administration) Act* 1999 (Cth). That section provides:

> *(2) If:*
>
> *(a) either:*
>
> *(i) a social security payment ……is being paid to a person; or …..*
>
> *(b) an event or change of circumstances occurs that might affect the payment of that social security payment ….*
>
> *the person must, within 14 days after the day on which the event or change occurs, inform the Department of the occurrence of the event or change.*

Section 2(1) of the amending Act provided that s 66A was taken to have commenced on 20 March 2000.

On 26 October 2011 this Court handed down its judgment in *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 262 ALR 200, which had been reserved at the time the amending Act received assent. If *Poniatowska* applied to the prosecution of the defendant, the prosecution could not succeed because there was, at the time of the defendant's conduct, no duty to inform Centrelink of increases in income.

The criminal proceedings in the Melbourne Magistrates Court have been adjourned on a number of occasions due to the uncertainty surrounding the operation of s 66A of the amending Act and the defendant has not yet entered a plea. In July 2012 the defendant applied to this Court remove the proceeding from the Magistrates' Court, pursuant to s 40(1) of *the Judiciary Act* 1903 (Cth). On 14 December 2012 this Court ordered that the cause be removed; the parties agreed that the matter proceed by way of Case Stated and on 19 December 2012 Hayne J referred the Case Stated for the consideration of the Full Court.

The defendant has filed a Notice of Constitutional Matter and the Attorney-General of the Commonwealth of Australia and the Attorney-General for South Australia have intervened.

The questions reserved for the consideration of the Full Court include:

- Does s 66A of the *Social Security (Administration) Act* 1999 (Cth) create a duty, from 20 March 2000, for the purposes of s 4.3(b) of the *Commonwealth Criminal Code*, such that a failure to inform the Department of the occurrence of an event

or change of circumstances as required by s 66A of the Administration Act amounts to "engaging in conduct" for the purpose of s 135.2(1)(a) of the *Commonwealth Criminal Code*?

- If yes to Question 1 is s 66A invalid in so far as it has retrospective effect, because it infringes the separation of judicial and legislative powers mandated by the Constitution?

- Did the notices issued to the defendant [as identified in the Case Stated], or any of them, create a duty for the purposes of s 4.3(b) of the *Commonwealth Criminal Code*, such that a failure to perform the act or acts required by the notice or notices amounts to "engaging in conduct" for the purpose of s 135.2(1)(a) of the *Commonwealth Criminal Code*?

KAKAVAS v CROWN MELBOURNE LIMITED & ORS (M53/2012)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2012] VSCA 95

Date of judgment: 21 May 2012

Date special leave granted: 14 December 2012

The appellant sued the first respondent ("Crown") and two of its employees in the Supreme Court of Victoria for damages of $20.5 million for losses incurred by him in gambling at their casino between June 2005 and August 2006. The appellant's claim was based on his having a 'special disability': a pathological gambling condition which allegedly impaired his ability to control, or make rational decisions about, his gambling. He claimed that the respondents knew of that disability and took unconscionable advantage of it, to their financial advantage, by encouraging him to gamble at Crown Casino over the period in question. The appellant further alleged that he suffered a disability in that, over the whole of the relevant period, he was the subject of an 'interstate exclusion order' ('IEO'), made in NSW. Under amendments to the Victorian legislation in 2002, this IEO meant that he was legally prohibited from entering a Victorian casino and (following amendments in 2004) that, if he did, any winnings paid, or payable, to him were forfeited to the State. He claimed that Crown took unconscionable advantage of this 'situational disability' by encouraging him or permitting him to gamble when he could not win, only lose.

Harper J dismissed the appellant's claim (and gave judgment for Crown on its counterclaim for $1 million). His Honour reviewed the entirety of the appellant's gambling over the period in respect of which his claim was made and concluded that nothing which occurred during the relevant gambling period provided clear indicia of a person not able to conserve his own best interests. Crown was therefore not placed on notice that the appellant was burdened by a special disability.

The appellant's appeal to the Court of Appeal (Mandie and Bongiorno JJA and Almond AJA) was dismissed. The Court held that the appellant had failed to demonstrate that the trial judge's conclusion that he was not in a position of special disadvantage was erroneous. The judge was entitled on the evidence to reject the appellant's argument regarding his alleged special disadvantage. The special disability or disadvantage must be one that exists 'in dealing with the other party' and that puts the person at a disadvantage in dealing with that other party. Here, the wagers were standard gambling transactions and Crown had no greater advantage over the appellant than it had over any other gambler. In the long run, the appellant was neither more likely nor less likely to win than any other gambler. These considerations showed that the wagering transactions were not unfair, unjust or unreasonable as required by the doctrine in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

The Court further held the principle of constructive knowledge had no application in this case. The trial judge's findings were that, in all the circumstances, Crown was entitled to accept the appellant as he sought to be accepted. A conclusion that it should have embarked upon further investigations was precluded by those findings and, in any event, was specifically rejected as being necessary by the trial judge. This was entirely consistent with his findings generally.

The Court concluded that none of the appellant's submissions, with respect to his case of unconscionable conduct against Crown, based on his being under a special disability by reason of his being unable to control a propensity to gamble excessively, should be accepted.

The grounds of appeal are:

- The Court of Appeal erred in failing to find that the gambling transactions of the First Respondent with the Appellant, who was a pathological gambler and a person subject to an Interstate Exclusion Order within the meaning of s 78B of the *Casino Control Act* 1991 (Vic), were unconscionable within the meaning of s 51 of the *Trade Practices Act* 1974 (Cth) and under the general law.

- The Court of Appeal erred in finding that the gambling transactions of the First Respondent with the Appellant were not unconscionable because they were standard gambling transactions.

- The Court of Appeal erred in failing to find that the First Respondent knew, or ought to have known, that the Appellant was subject to special disadvantage in gambling with the First Respondent.

- The Court of Appeal erred in finding that the Appellant suffered no loss by reason of gambling at the First Respondent's casino.

STATE OF NSW v KABLE (S352/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 243

Date of judgment: 8 August 2012

Special leave granted: 14 December 2012

Mr Gregory Kable ("the Respondent") stabbed his wife to death on 5 September 1989. He was initially charged with murder, but the prosecution later accepted his plea of guilty to manslaughter on the basis of diminished responsibility. The Respondent was then sentenced to five years and four months imprisonment. Whilst in prison he wrote threatening letters to various people. The Respondent was then charged with using postal services in contravention of s 85S of the *Crimes Act* 1914 (Cth) and held on remand beyond the expiry (on 4 January 1995) of his prison term. On 23 February 1995 Justice Levine granted him bail on the fresh charges (which were later permanently stayed). His Honour also ordered however that the Respondent be detained in custody for six months ("the detention orders"). Those orders were made pursuant to the *Community Protection Act* 1994 (NSW) ("the CPA"). That Act authorised the Supreme Court to make orders for the detention of the Respondent (and no other person) upon an application made by the Director of Public Prosecutions ("DPP"). He appealed from the detention orders on the basis that the CPA was invalid. That appeal was ultimately successful, with this Court setting aside those orders in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The Respondent then sued the State of NSW ("the State") for damages for malicious prosecution, abuse of process and false imprisonment.

On 30 July 2010 Justice Hoeben struck out the Respondent's entire claim. His Honour held that malicious prosecution could not be made out, as the evidence indicated that the DPP had reasonable cause to commence the CPA proceedings. Regarding abuse of process, Justice Hoeben found no evidence of improper purpose in the taking of those proceedings. The first two claims could also not succeed because the State itself had not been the prosecutor. His Honour further held that the false imprisonment claim must fail because the Respondent's continued detention had been due to the (presumably valid and effective) orders of a superior court.

On 8 August 2012 the Court of Appeal (Allsop P, Basten, Campbell & Meagher JJA, McClellan CJ at CL) unanimously allowed the Respondent's appeal in part. Their Honours held that the claims for malicious prosecution and abuse of process were correctly struck out, as their success required certain mental elements that the Respondent had not sought to prove. It was also not open to a litigant to impugn the motives of Parliament. The Court of Appeal held however that the Respondent's claim for false imprisonment should not have been struck out, as the presumption of the validity of the superior court's orders did not apply. This was because the detention orders had not resulted from an exercise of judicial power, but from an exercise of non-judicial power which the High Court had ruled invalid. Their Honours held that the common law protection from suit of officers who obey invalid judicial orders did not extend to those who had enforced the detention orders. As the State had no other defence available, the Court of Appeal found it vicariously liable for the Respondent's false imprisonment pursuant to

s 8(1) of the *Law Reform (Vicarious Liability) Act* 1983 (NSW). The matter was then remitted to a single judge for the assessment of damages.

The grounds of appeal include:

- The Court of Appeal erred in holding that the order of Levine J made on 23 February 1995 that the Respondent be detained in custody for six months pursuant to the CPA, an order of a superior court of record, was not valid until set aside on the basis that the CPA was subsequently held to be constitutionally invalid.

Both parties have filed a "Notice of a Constitutional Matter" under s 78B of the *Judiciary Act* 1903 (Cth) and the Attorneys-General for the Commonwealth, Victoria, Queensland and Western Australia have all advised this Court that they will be intervening.

On 2 January 2013 the Respondent filed a Notice of Contention, the grounds of which include:

- The Court of Appeal should have decided (at [64], [129], [134], [168]) that the State was directly liable in false imprisonment to the Respondent, in addition to being vicariously liable for that tort (at [66], [167], [171], [173], [174], [175]).