Supreme Court Notes

by Cameron Ford, Barrister at Law

CRIMINAL LAW - *McKinney* direction - criticism of - only *obiter dicta* - no established risk of fabrication of police evidence in NT - *stare decisis* in High Court.

R v Jimmy Butler (No 2) (Kearney J) 14/11/91.

Accused sought a McKinney warning be given to the jury. Refused. Held: the warning is that it is dangerous to convict on the disputed and uncorroborated confession made to police while in custody. It is only required when the making and content of an uncorroborated confessional statement to the police while in custody is disputed. "Disputed" is not to be given its widest possible meaning. It means where the actual making of the statement is disputed, not where there is some dispute about the confession (as to the dispute in this case, see R v Jimmy Butler (No 1), *supra*).

It was unfair of the High Court to make a rule of practice of national application when there was no established risk in the NT of fabrication of police evidence. The NT has been saddled with the consequences of police malpractice in the eastern states. Brennan J's prediction of an unbalancing of the even-handedness of the criminal trial has been realised in the upsurge in the number of *voire dires* since McKinney.

The High Court did not apply the new rule of practice to the facts in McKinney, so it really is only *obiter dicta*. *Stare decisis* applies in the High Court, exceptions being allowed only with great caution and in clear cases. But the majority in McKinney did not consider that the new rule involved any conflict with that principle.

The new rule removes the trial judge's discretion to decide whether the facts justify a warning and the nature of that warning.

Here, the making of the confession was not in dispute -- it was never suggested that the police fabricated the record of interview. And there was independent and reliable corroboration in the form of an audio tape and a prisoner's friend.

Warning refused.

Counsel: R J Wallace of DPP, Crown; G Bauman of NAALAS, Accused.

PRACTICE AND PROCEDURE - setting aside judgment obtained at trial - power where defendant appears then obtains leave to withdraw - principles to be applied - extension of time to bring application - costs - solicitor's right of audience when not on the record.

R Holt & Co Katherine Pty Ltd v Donald Edgar Hoare (Mildren J) 18/11/91

Application by defendant to set aside judgment obtained at trial in his absence under RSC 49.02. His solicitors had obtained leave to file a notice of ceasing to act, but shortly before trial accepted instructions to appear at trial on 19 February 1991 to seek an adjournment. They did and it was refused. They then obtained leave to withdraw and the trial proceeded in the absence of the defendant. Judgment was entered for the plaintiff after hearing evidence and, in due course, the defendant was informed of the judgment. However, in the meantime his property had been severely flooded and his attentions were directed to other affairs. He applied to set aside judgment on 11 October 1991 after bankruptcy proceedings were served on him. Argued that the rule only applies where a defendant does not appear at trial, and that as his solicitors had appeared and sought an adjournment, the Court had no power under the rule.

Held: after the defendant's solicitors obtained leave to withdraw, the trial proceeded in the absence of the defendant (*quaere* whether solicitors had a right of audience after filing notice of ceasing to act and not being on the record). It was not intended to restrict the operation of rule 49.02 only to an absence on the first occasion that the trial is called. There was no transcript to show whether or not he was called, but presume regularity. The court therefore had power, and it became a question of how to exercise it.

Principles to be applied are (1) reason for failure to appear; (2) whether undue delay prejudicing the plaintiff or enabling rights of third parties to intervene; (3) whether plaintiff prejudiced by new trial; (4) whether defendant has some chance of success. As to the latter, the test is not high; weakness is not a bar; there must not be a trial on the affidavits, but the court is not bound by something which is patently incredible.

Here the non-appearance was explained, no prejudice was alleged by the delay or a new trial and the defendant's case, while not strong, was arguable.

Judgment set aside on precondition that defendant pay plaintiff's costs of an application for summary judgment before the Master in 1989.

Counsel: D Farquhar of Cridlands, Plaintiff; unknown for the Defendant.

PRACTICE AND PROCEDURE - stay of execution - principles applied.

Thiess Contractors Pty Ltd v White Range Gold NL [(No 2)] (Martin J) 21/11/91

Defendant successfully applied to strike out action based on *Workmen's Liens Act*. Plaintiff appealed and brought application for stay of execution. Stay was to prevent Registrar-General from removing lien from Mining Lease.

Held: stay will be granted where an appeal will be rendered nugatory without it.

That was the case here.

Defendant sought undertaking as to damages it might suffer if appeal unsuccessful. Not granted because no evidence what those damages might be. Only evidence was that put forward on prejudice in the application for removal of liens (see decision of 21 October above).

Counsel: G Hiley QC instructed by Mildrens, Plaintiff; T Riley QC instructed by Philip & Mitaros, Defendant.

PRACTICE AND PROCEDURE - security for costs of appeal from Workers' Compensation Court - principles - impecuniosity a special circumstance - delay in applying - respondent encouraging appellant in appeal - Nominal Insurer's obligations.

Wilson v Lowery (Martin J) 21/11/91

Application by respondent for security for costs of an appeal from Workers' Compensation Court.

Application made after consent orders as to conduct of appeal and about two weeks after institution of appeal.

Argued that because Nominal Insurer was standing behind the appellant, the respondent was assured of getting costs if it succeeded because of statutory obligation on the Nominal Insurer to pay compensation.

Held: the statutory obligation may not extend to the payment of costs by the Nominal Insurer.

The inability of an appellant to pay a successful respondent's costs of an appeal is a special circumstance to justify ordering security.

Application should be made promptly and before appellant has spent money preparing for hearing.

That points of law affecting a matter of public importance are involved in the appeal will be a factor in refusing security.

The court can proceed as if the appellant has virtually no assets if the *prima facie* impoverishment is proved and it could have easily been rebutted if not true.

Here, the respondent consented to directions for the hearing of the appeal on the first return of the summon for security.

The respondent cannot urge the appellant on in the preparation of the appeal and at the same time seek security.

Application refused.

Counsel: J Waters instructed by Ward Keller, Applicant Respondent; N Henwood instructed by Elston & Gilchrist, Respondent Appellant.

LEGAL PRACTITIONERS - costs agreements - contingency fees - champerty and maintenance - Law Society investigations - privilege against self-incrimination not applicable - legal professional privilege not available - duty to co-operate fully - proceed with utmost expedition

FAMILY LAW - costs agreements - content - contingency fees

Andrew Gordon Rogerson v Law Society of the NT (Kearney J) 25/11/91

Application by solicitor to restrain Society from continuing an investigation into client files. Investigation directed to costs agreements allowing the solicitor to retain a percentage of any amount recovered by the client (the agreement here was "Added to the basic fee arrived at in accordance with the above scale we shall retain 5% of the gross award or settlement received by you"). Solicitor intentionally obstructed the investigation alleging files protected by legal professional privilege. Also argued that solicitor protected from delivering files because of privilege against self-incrimination.

Held: (1) Investigations: relevant to practitioner's fitness to practice that he co-operate to fullest extent possible with investigation into professional conduct.

The investigation should proceed with the utmost expedition. Practitioner should immediately provide all information within his capacity to provide. Unnecessary and may be undesirable for Society to identify in advance the files it seeks.

(2) Contingency fees: it is perfectly proper to agree to charge fees only if the client succeeds. It is champertous, or improper, unethical and tortious to take a percentage of the proceeds of litigation. This is elementary to solicitors' practice and it is shocking and distressing, lamentable and wholly inexcusable ignorance for a solicitor not to know. Champerty is an aggravated form of maintenance.

It is tortious but not criminal in the NT.

(3) Self-incrimination: no-one is bound to answer any question or produce any document if to do so would tend to expose him to the imposition of a civil penalty or conviction for a crime.

This privilege can only be excluded by clear intention (express words are not necessry) in statute.

It applies to non-judicial proceedings such as the investigation.

It has not been excluded by the Act but there is no question of civil penalty or criminal conviction -- proceedings for professional misconduct are not, either.

Not protected by this privilege.

(4) Legal Professional Privilege: protects communications either to enable the client to obtain legal advice or the solicitor to give it; or made about litigation taking place or reasonably contemplated.

Here, no actual or anticipated litigation and the costs agreements were not confidential.

This privilege also applies in extra-judicial proceedings, unless abrogated by statute, which won't be lightly inferred.

The contractual duty of confidence by solicitor to client is overridden by the duty to obey the general law.

The privilege does not apply in practice to investigations under the Act directed to the professional conduct of a solicitor viz a viz his client, at least regarding the costs agreements.

(5) Family law costs agreements O38 R 8: costs agreements are authorised by this rule, but must contain prescribed matters. Those not properly set out here (examination of each in reasons) and the agreement is notably deficient. Not necessary for the rule to specifically prohibit contingency fees because the general law does so.

Injunction refused.

Counsel: M McCormack instructed by Loftus & Cameron, Plaintiff; G Hiley QC instructed by Cridlands, Defendant.