Cameron Ford's Supreme Court case notes

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CHARITABLE TRUSTS – CRITERIA

In *GEAT v Deloitte, Touche Tohmatsu & Ors* (No 2) [2017] NTSC 4, Hiley J held that a trust to receive mining royalties and apply them for the benefit of members of an Aboriginal community, including for sport and social facilities, was a charitable trust. The trust had sued its accountants and lawyers, the latter of whom took the point that it was not a charitable trust and was not entitled to protection and enforcement by the Attorney-General as parens patriae. They said to be charitable, the trust had to be solely for the relief of poverty and for the general public; the inclusion of grants for sport and social facilities and its being only for specific Aboriginal clans rendered it not a charitable trust. His Honour held at [93] that whether purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language used. Charitable trusts must fall exclusively within one or more of the four Pemsel categories of the relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community: [98]. The trust must be for the benefit of the public or a section of it but not for a private purpose, and the carrying out of its objects must be of benefit to the public: [99]. He held at [160] that a group of Aboriginal people may fall within the 'nationality' exception to trusts for a small group of people. His Honour said at [184] that no authority supported the contention that a class comprising the members of one or more tribes or clans would conflict with the principles. Those people are beneficiaries, not on the basis of their personal relationship with a particular person or persons, but on the basis of their membership of a section of the public which holds the communal rights in the land: [202]. It is not one's descent from a particular person or persons that permits and defines one's membership of the group: [222]. A particular group may constitute a section of the public notwithstanding that the number of members of that group is small. The only requirement is that the membership is not numerically negligible: [234]. A trust which has as its purpose the relief of poverty is presumed to be for the public benefit: [251]. There must be a connotation in the trust that its sole object is for the relief of poverty: [253]. 'Poverty' does not mean destitution. This trust was not solely for the relief of poverty: [274]. the provision of sport and social facilities may be a charitable purpose: [300]

CHILD ABUSE MATERIAL – 'CONTEXT'

In *Guerin v HB* [2017] NTSC 14, Blokland J held that the context of the creation and possession of material is irrelevant to whether it meets the definition of child abuse material in s 125A(1) of the *Criminal Code*. The Local Court had held that photos taken about thirty years ago by a now-retired photographer in Alice Springs of his daughter, some of which were hung on the walls of his home, were not child abuse material taking into account the family context in which they were taken. On appeal by the prosecution, Blokland J held at [24] that the context referred to in s 125A(1)(b)—"in a sexual, offensive or demeaning context"—referred to the context evident in the photo, including any relevant indicators on the photo such as script, name, dates, series numbers. It did not refer to the context in which the photo was taken or possessed. Additionally, her Honour said at [29] that it cannot be assumed that the fact that the impugned images were produced in a family setting will of itself negate exploitation and abuse and the fact of consent by a child is of little or no consequence. At [42] her Honour said the factors which might be relevant to whether material depicted a child "in a sexual, offensive or demeaning context" were:

- whether the image is likely to arouse anger, resentment, disgust or outrage in the mind of a reasonable person;
- the standards of morality, decency and propriety generally accepted by reasonable adults;
- any literary, artistic or educational merit of the material;
- the general character of the material (including whether it is of a medical, legal or scientific character.
- Construction security of payment – S 48 'review'

In *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors* (No 2) [2017] NTSC 11 at [50]-[66], Kelly J considered the nature of a review under s 48(1) of the *Construction Contracts (Security of Payments) Act*. Her Honour said it is a review of the merits of the decision by way of a hearing de novo. Only a decision to dismiss an application for adjudication without a determination on the merits under s 33(1)(a) may be reviewed. The court must review whether any of the criteria in s 33(1)(a)(i) to (iv) apply, on the material delivered in the adjudication (and nothing else). It cannot mean that the applicant has to start again with a fresh application and the respondent with a fresh response. The reviewing judge will often be assisted by submissions on whether the decision should stand but that there is no automatic right to a hearing and that ordinarily the judge reviewing the decision would invite written submissions on any issues considered necessary and then decide the matter on the material before the adjudicator and any additional written material. In appropriate cases the reviewing judge might hold a hearing and would have the power to admit further evidence of the kind that the adjudicator has power to request under s 34.

DAMAGES – EXEMPLARY, AGGRAVATED – 'PERSONAL INJURY'

In *LO and others v Northern Territory* [2017] NTSC 22, Kelly J held that damages for extreme distress, humiliation and the immediate physical effects caused by young prisoners being placed in spit hoods and shackles were not 'personal injury' within the meaning of s 19 of the *Personal Injuries (Liabilities and Damages) Act* so that section did not apply to prohibit an award for exemplary and aggravated damages. Her Honour held at [374] that it is not a matter of categorising the proceeding as an action or claim for personal injuries but rather of looking at the damage in respect of which each plaintiff is to be awarded compensation. In this case the harm claimed for by the plaintiffs was not "personal injury". Her Honour declined to award exemplary damages because the actions of the prison officers were not "conscious wrongdoing in contumelious disregard of another's rights": [392]. Aggravated damages were awarded of between $2 000 and $5 000 to the four plaintiffs because their mental suffering was increased by the fact that they were youths in the care of the defendant. General damages were assessed at $10 000 for each plaintiff.

EVIDENCE, ADMISSIBILITY – RULING NOT BINDING

In *R v MLW* (No. 2) [2017] NTSC 20 at [6], Mildren AJ held that an accused could challenge the admissibility of evidence even though it had been ruled admissible by two previous judges in two previous trials. His Honour said that as a matter of judicial comity, he would give great weight to the previous rulings but that a ruling on admissibility of evidence is not binding on the Judge who made the ruling.

EVIDENCE, COINCIDENCE

In *R v Perner* [2017] NTSC 23, Kelly J admitted as tendency evidence under s 98(1) of the *Evidence (National Uniform Legislation) Act* evidence from intercepted phone calls of the accused's previous participation in supplying drugs in the company and at the direction of others. Her Honour agreed with the Crown that the improbability of the events occurring by coincidence could lead the jury to conclude that the accused committed the acts charged. For more facts, see Evidence, tendency – 'Fact in issue' – 'Prejudicial effect'.

EVIDENCE, HEARSAY – FIRST, SECOND AND THIRD HAND

In *R v MLW* (No. 2) [2017] NTSC 20 at [12], Mildren AJ ruled admissible evidence by a mother of what her child had told her ten years ago when the child was five and which the child did not now remember. The evidence was not admitted as proof of the facts asserted, but of the fact that the words had been said by the accused, in support of the Crown's contention that he was grooming the child for sexual acts. His Honour also held at [14] that the evidence of two people to whom the mother told the child's comments at the time would be admissible under the exception to the credibility rule in s 108(3) of the *Evidence (National Uniform Legislation) Act* if the mother's credit were questioned on cross-examination.

EVIDENCE, TENDENCY – 'FACT IN ISSUE' – 'PREJUDICIAL EFFECT'

In *R v Perner* [2017] NTSC 23, Kelly J admitted as tendency evidence under s 97(1) of the Evidence (National Uniform Legislation) Act evidence from intercepted phone calls said to show a tendency of the accused to participate in the supply of illicit drugs on instructions from a particular person. That evidence was fifteen instances of the accused participating in the supply of drugs on instructions from or in conjunction with that person over a two-month period during which the two counts on the indictment were said to have occurred. Her Honour rejected an argument that the evidence was inadmissible under s 97 because "the character, reputation, conduct or tendency" of the accused was a fact in issue. She said at [18]-[19] that those matters were not "in issue" because they were not elements of the offence and the conduct in those phone calls – supplying drugs on other occasions – was not in issue. Her Honour also rejected an argument based on s 95 that the evidence was inadmissible as tendency evidence because it was admissible as direct evidence. She said at [22] that the effect of s 95 is that tendency evidence is admissible if it is relevant for another purpose and the conditions in ss 97(1)(a) and 101 have been met, but not otherwise. The evidence here had significant probative value and no prejudicial effect which could not be overcome by a direction. 'Prejudicial effect' means possible misuse by the jury, not a tendency to prove the Crown case: [26].

FAMILY MAINTENANCE – JOINDER OF BENEFICIARIES

In *Cutting v Public Trustee* [2017] NTSC 6, Master Luppino declined to join a number of beneficiaries to a family maintenance proceeding which sought the approval of a compromise. His Honour reiterated at [27] the usual rule that beneficiaries are not joined to such proceedings and instead must rely on the executor to perform its duties. Exceptions are where the executors take an attitude which compels beneficiaries to seek representation to protect the gifts, or where the executors are not fulfilling their duty, or some other reason. The beneficiaries here alleged that the previous executors before the appointment of the Public Trustee should not have made the compromise but his Honour found they acted on legal advice and in any case, the Public Trustee could remedy any deficiencies and do all that the beneficiaries could do in the proceeding.

JUVENILE DETENTION – POWERS OF OFFICERS – USE WEAPONS

In *LO and others v Northern Territory* [2017] NTSC 22, Kelly J held that the use of CS gas to subdue a very unruly prisoner was reasonably necessary force and not an offence under s 6(e) of the Weapons Control Act. Four juveniles had been placed in isolation cells while secure accommodation could be found for them after they had escaped with weapons and been recaptured. They sued the Territory for battery for exposure to the CS gas used on another unruly prisoner near their cells. They argued the use of the gas was not reasonably necessary because they were minors, they were confined to their cells when the gas was deployed, the use of the gas in the centre was an offence under the Act, and the officers had alternatives they should have used. Her Honour held at [123] that the exemption from criminal liability in s 12(2) was a general one applying to the officers acting in the course of their duties. She rejected all claims for battery and assault expect those admitted by the Territory: see Damages – Exemplary, aggravated – 'Personal injury'.

NON-PAROLE FOR YOUNG OFFENDER

In *JF v The Queen* [2017] NTCCA 1, the Court of Criminal Appeal reduced a non-parole period for a twenty-five year old offender from ten years to eight years but did not disturb a head sentence of fourteen years for sexual intercourse without consent of a three-year old male and possession of child abuse material. The Court said at [64] that different weightings had to be given to the sentencing factors in setting a non-parole period than in setting the head sentence, and that the offender's deprived childhood, relative youth and willingness to undergo treatment justified a lower non-parole period. Section 55A of the *Sentencing Act* only requires a non-parole period of 70% of the head sentence, not of all the offences: [69].