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Supreme Court judgments

ADMINISTRATIVE LAW – appeals from commercial visitor accommodation refusals

In *Reynolds v Chief Health Officer* [2020] NTSC 44, Grant CJ doubted, without deciding, that the appeal provisions of s 106 of the *Public and Environmental Health Act* (NT) do not apply to a decision to refuse registration as a commercial visitor accommodation business under that Act. If the appeal provisions did not apply, it would remove provisions relating to registration and renewal, compliance, cancellation, notification of sale or disposal of a business, the declaration of standards and the maintenance of the register.

ADMINISTRATIVE LAW – improper use of evidence is jurisdictional error

In *Sunbuild Pty Ltd v Local Court Judge Therese Austin & Anor* [2020] NTSC 38, Barr J granted certiorari to quash a summary judgment of the Local Court that held an employer liable for a secondary mental injury (see WORKERS COMPENSATION – SUMMARY JUDGMENT FOR SECONDARY INJURY). To decide factual merits, the trial judge had, without warning the parties, taken into consideration affidavit evidence expressly tendered and relied on only for a notice issue. As the evidence was not properly before the judge, the decision was made without jurisdiction. There was also a denial of procedural fairness which, although not jurisdictional error, is a proper basis for the making of an order in the nature of certiorari.

ADMINISTRATIVE LAW – leave to appeal "on a question of law"

In *Reynolds v Chief Health Officer* [2020] NTSC 44 and *HN v NTCAT & Ors* [2020] NTSC 48, Grant CJ and Hiley J respectively repeated the views of Grant CJ in *Booth v An Assessor* [2019] NTSC 89 that an appeal from NTCAT to the Supreme Court "on a question of law" is narrower than an appeal that merely "involves" a question of law. The subject matter of the appeal must be the question of law itself, rather than some mixed question of fact and law or a matter which merely "involves" a question of law. The appeal is more in the nature of judicial review than an appeal in the conventional sense of a rehearing. The court must be satisfied of the existence of a question of law before leave is granted. Leave should be granted only if it is in the interests of justice. Considerations which will generally be decisive are whether there is sufficient doubt about the question of law to justify the grant of leave, the importance of the question of law raised, and whether a substantial injustice would result if the error of law was not corrected. A failure to afford a party procedural fairness may constitute an error of law and give rise to a competent ground of appeal.

ADMINISTRATIVE LAW – questioning witnesses in NTCAT

In *HN v NTCAT & Ors* [2020] NTSC 48, Hiley J held that in NTCAT there is no unfettered right for a party to question a witness; the NTCAT Act seems to

contemplate that questions of a witness will normally be asked by a member of the Tribunal, and that another person can only question a witness if the Tribunal considers the question relevant. There is no express obligation upon the Tribunal to allow a person to ask questions of a witness or another person, accept evidence about a matter that is not in issue or which is not otherwise relevant, or attach particular weight to particular evidence or to a submission which it considers of little if any relevance to any issues in the proceeding.

ADMINISTRATIVE LAW – review on "merits of the decision"

In *Reynolds v Chief Health Officer* [2020] NTSC 44, Grant CJ held that a review by the Local Court under s 84 of the Food Act (NT) of the merits of a decision was a species of original jurisdiction for the Local Court to make the decision afresh. The court has scope and discretion to determine what form of hearing the circumstances require. A review on the merits will usually, but not always, entail a hearing de novo, and requires the review body to conduct its own independent assessment and determination of the matters necessary to be addressed it is unnecessary for the review body to find error in the original decision, and the review is directed to the actual decision rather than the reasons for it. The review body must exercise its own judgment and reach its own conclusions. Additional evidence may be received where the review tribunal is required to exercise original jurisdiction and make its own decision.

ADMINISTRATIVE LAW – transfer from local Supreme Court

In *Goldsmith Pty Ltd v GPT RE Ltd & Ors* [2020] NTSC 30, Grant CJ refused judicial review of an interlocutory decision of the Local Court not to transfer proceedings to the Supreme Court. He said inferior court decision are only amenable to judicial review for jurisdictional error and error on the face of the record. It was not jurisdictional error to refuse to transfer proceedings where it was only contingent and prospective that the monetary jurisdictional limit of the Local Court would be exceeded. The Local Court's jurisdiction is not limited to making an order for transfer unless positively satisfied that the claim will not exceed the civil jurisdictional limit.

WORKERS COMPENSATION – summary judgment for secondary injury

In *Sunbuild Pty Ltd v Local Court Judge Therese Austin & Anor* [2020] NTSC 38, Barr J held that a worker was not entitled to summary judgment for workers compensation for secondary mental injury simply because the employer had denied liability. The worker needed to give notice of the secondary injury and prove that it flowed from the physical injury for which the employer had accepted liability. The worker could not rely on the employer's conduct as having accepted liability for the secondary injury unless the worker pleaded or relied on estoppel, which it did not do. Summary judgment was quashed – see ADMINISTRATIVE LAW – IMPROPER USE OF EVIDENCE IS JURISDICTIONAL ERROR.

APPEAL – delay in judgment

In *Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd* [2020] NTCA 4, the Court of Appeal held that it is permissible for there to be an appreciable delay between judgment and reasons; that the delay itself is not a ground of appeal but the trial judge's advantage is eroded and an appellate court must look at challenged facts with special care; that more comprehensive statement of the evidence should be provided and omitted evidence will not necessarily be assumed to be have been considered; and that an appellate court should consider the prospect that the judge was under great pressure to complete and publish the judgment.

CHILDREN – underlying principles bind court

In *NB & Ors v SB & Ors* [2020] NTCA 2, the Court of Appeal held the "underlying principles" in Part 1.3 of the *Care and Protection of Children Act 2007* (NT) bind the court as well as the executive, and the Local Court is subject to the requirements set out in ss129 and 130. Tension among the achievement of different criteria and principles is to be resolved by according paramountcy to the best interests of the child.

CIVIL PROCEDURE – privilege eroded by particular discovery

In *Sunbuild Pty Ltd v Local Court Judge Therese Austin & Anor* [2020] NTSC 38, Barr J granted certiorari to quash an order of the Work Health Court requiring an employer to identify the

date and time of surveillance footage in its list of privileged documents. He said disclosure of the date and time eroded the employer's privilege in that it would be partial disclosure and would enable the worker to know those details. To enumerate and list the relevant documents for which privilege is claimed, to enable the privilege claim to be assessed (and challenged), there can be no legitimate requirement for the documents to be listed in a manner which would result in the loss of the benefit of the privilege. The error was 'directly jurisdictional' in that the court exceeded its powers in making an order which impinged — albeit slightly — on the employer's common law right.

CIVIL PROCEDURE – public interest immunity for cabinet documents

In *Wickham Point Development Pty Ltd v Commonwealth of Australia & Ors (No 5)* [2020] NTSC 31, Luppino AsJ was minded to inspect Cabinet documents to determine a claim to public interest immunity. He said there is a three step process of determining that immunity, namely determining whether (a) production would harm the public interest; (b) there is a public interest in the requestor having them; and (c) the balance favours production. Cabinet documents (a broad term) prima facie are entitled to the immunity but may have to be produced if exceptional circumstances show the public interest in production outweighs that of non-production. Considerations will be the reasons given as to why the revelation of the documents would impact the proper functioning of government, whether the document is only historical and the subject matter of the document. The documents must not only be relevant by must contain material evidence before they will be required to be produced. To claim the immunity, there must be a real possibility as opposed to a probability that harm will arise from production.

CIVIL PROCEDURE – rules for declarations

In *LKAJ Two Pty Ltd v Squire Patton Boggs (AU) & Anor* [2020] NTSC 45, Luppino AsJ held that superior courts have an inherent power to grant declaratory relief that is not modified by the statutory power in s18 of the *Supreme Court Act*. There must be more than a hypothetical case to obtain a declaration; the resolution of the question must be necessary to determine a legal controversy; the relief must have consequences for the parties and cannot relate to circumstances that have not occurred, nor may ever occur; the party seeking declaratory relief must have a real interest in the relief; there must be proper argument – a declaration will not be made in default of defence or on admissions or by consent.

CIVIL PROCEDURE – strike out vs summary judgment – "embarrassing" pleadings

In *LKAJ Two Pty Ltd v Squire Patton Boggs (AU) & Anor* [2020] NTSC 45, Luppino AsJ held that "embarrassing" in the context of pleadings, in general terms means that the pleadings do not state material facts sufficiently clearly against the opposite party so that the opposite party is in doubt as to what is alleged and gave examples at [14]. Summary judgment is a summary determination of the proceeding on the ground that the claim or defence is bad in law whereas in a strike out application, it is assumed that an arguable claim or defence exists but the pleading fails to properly express that claim or defence. Strike out is not a final determination of the proceedings unless the proceedings are also dismissed. Material facts are those necessary to formulate the complete cause of action, are not to be expressed in terms of great generality and should have sufficient particulars to enable the trial to be conducted fairly to all parties.

EVIDENCE – regard to non-evidence

In *Hardy v Rigby* [2020] NTSC 42, Hiley J rejected an argument that a sentencing judge should have had regard to a Bail Assessment Report and a Supervision Report not admitted into evidence. He said the judge is entitled to rely on counsel to clearly identify materials relied upon and what use is to be made of such materials and might be criticised for having regard to materials not in evidence and not referred to by counsel. Counsel, particularly experienced counsel, may have made a deliberate forensic decision not to tender or rely on particular material.

COSTS – differential order by time

In *Value Inn Pty Ltd v Proprietors of Unit Plan 2004/048 & Anor* [2020] NTCA 8, the Court of Appeal restored the Local Court's allocation of costs based on an

approximation of the time spent on discrete and severable issues of fact and law, saying the trial judge was best placed to make that decision and that it should not be based on the number of issues. Successful defendants may not be penalised for the costs of unsuccessful defences to the same extent as plaintiffs who are unsuccessful on some claims.

COSTS – indemnity for hopeless application

In *Nilsen (NT) Pty Ltd v Delta Electrics NT Pty Ltd (No 2)* [2020] NTCA 6, Mildren AJ sitting as the Court of Appeal ordered an unsuccessful applicant to pay indemnity costs of a hopeless application for leave to appeal from an interlocutory order striking out the applicant's defence. Costs were payable forthwith as there is no rule deferring the payment of costs in an application for leave to appeal.

COSTS – indemnity lump sum for frivolous application

In *Booth v An Assessor under Section 24 of the Victims of Crime Assistance Act 2006 (NT) & Anor (No 2)* [2020] NTCA 7, Graham AJ sitting as the Court of Appeal ordered an unsuccessful self-represented applicant to pay indemnity costs fixed at $4755 of a frivolous and incompetent application for leave to appeal. ' If a litigant seeks to appeal a Supreme Court judgment that litigant bears an obligation to, at the very least, attempt to comply with the Rules of Court.'

COSTS – indemnity where plaintiff's offer lower

In *TTG Nominees Pty Ltd v Aileron Pastoral Holdings Pty Ltd* [2020] NTSC 15, Mildren AJ granted a successful plaintiff indemnity costs from one month after it made an offer to accept $400 000 inclusive of interest and costs, because it recovered some $454 000 plus interest and costs.

COSTS – loser's impecuniosity, futility – winner's public character

In *Monck v Commonwealth of Australia (No 2)* [2020] NTCA 1, the Court of Appeal ordered an unsuccessful self-represented applicant for leave to appeal to pay the costs of the Commonwealth, holding that the applicant's impecuniosity (and the resultant futility of the order) and the Commonwealth's character as a body politic were irrelevant to the exercise of the costs discretion, applying *Northern Territory v Sangare* [2019] HCA 25.

COSTS – prosecutor's failure to disclose

In *Hogan v Rigby (No 2)* [2020] NTSC 28, Hiley J declined to award indemnity costs against the prosecution after allowing an appeal against conviction for the prosecutions failure to disclose a statement of the appellant: see CRIMINAL PROCEDURE – PROSECUTION'S DUTY OF DISCLOSURE. He said the failure was inadvertent rather than wilful, that the appellant could have informed his counsel that he had made a statement and that if defence counsel had been more alert, they could have requested the statement. He awarded costs to the appellant on the standard basis.

CRIME – application of proviso

In *Flash v The Queen* [2020] NTCCA 5, the Court of Criminal Appeal overturned a murder conviction because the direction to the jury did not deal properly with intoxication and did not apply the proviso in s411(2) of the *Criminal Code 1983* (NT). The court said the proviso will have no application where the irregularity constitutes such a departure from an essential requirement of the trial process that it goes to the root of the proceedings. The direction in relation to the requisite intention, including the bearing of intoxication on the formation of that intention, is of such fundamental importance that a failure to provide adequate directions on the issue will ordinarily cause the trial to miscarry.

CRIME – directions for distress

In *Lynch v The Queen* [2020] NTCCA 6, the Court of Criminal Appeal held that the essential elements of the direction to the jury will be that it must be satisfied that the complainant was in a distressed state; that her distress was genuine; and that her distress was as a result of being sexually assaulted by the accused rather than some other cause. The probative value of evidence of diminishes with time as there is greater risk the distress was caused by something else.

CRIME – duty of Appellate Court

In *Hogan v Rigby* [2020] NTSC 25, Hiley J noted the High Court's decision in *Jones v The Queen (1989)* 166 CLR 409; [1989] HCA 16 to the effect that an appellate court is

required to hear and determine each tenable ground raised which argues in support of a verdict of acquittal.

CRIME – intoxication directions

In *Flash v The Queen* [2020] NTCCA 5, the Court of Criminal Appeal overturned a murder conviction because the direction to the jury did not deal properly with intoxication. The court said that, where intoxication is an issue, the summing up should: (a) refer to the evidence of intoxication and sobriety; (b) remind the jury that it is up to them to determine how intoxicated the offender was; and (c) explain that intoxication can cause a person to strike another person with more force than the person intended; or cause a person not to appreciate the degree or extent of the injury that their actions would likely bring about. In some cases, a direction may have to be given that an inference of intention may not be so readily drawn from the nature of the wounds where the offender is highly intoxicated.

CRIME – intoxication directions – one or two stage

In *Morton v The Queen* [2020] NTCCA 2, the Court of Criminal Appeal held that it is appropriate for a trial judge to use the words 'decide' or 'determine' in directing the jury in relation to their consideration of the degree or level of an accused's intoxication before considering whether he had the necessary intent.

CRIME – "serious sex offence"

In *The Attorney-General of the Northern Territory v SJE* [2020] NTCA 10, the Court of Appeal held that an offence contrary to s 474.27A of the *Criminal Code* (Cth) is not a "serious sex offence" within the meaning of s 4 of the *Serious Sex Offenders Act 2013* (NT) and that therefore the offender was not a "qualifying offender" under the latter Act and could not be the subject of a final continuing detention order or a final supervision order under s 23(1).

CRIME – sex offender detention orders

In *JD v The Attorney-General of the Northern Territory* [2020] NTCA 11, the Court of Criminal Appeal held that the court must be satisfied to a high degree of probability that the person is a serious danger to the community rather than being satisfied on the balance of probabilities; that not any risk will be an unacceptable risk of danger to the community; that the court has no power to force the Executive to make facilities available for the detention of the offender if there are insufficient resources for this to occur; and that, in determining whether the offender is "still" a serious danger to the community, the court may consider whether there have been any changes since previous detention orders.

CRIME – unsafe and unsatisfactory verdict

In *PW v The Queen* [2020] NTCCA 1, the Court of Criminal Appeal overturned a verdict of guilty of sexual intercourse with a child under 16 as being unsafe and unsatisfactory because of the extreme unlikelihood of anyone taking the risks alleged against the defendant, the shifting and improbable stories told by the complainant, some of which must have been untrue, and her inconsistent conduct in contacting the defendant which she irrationally explained.

CRIMINAL PROCEDURE – correction of sentencing errors

In *Andreou v Woodward* [2020] NTSC 34, Hiley J held that the sentencing judge had erred in not fixing a mandatory minimum, and remitted the matter to any judge in the Local Court for rehearing. He said it was not appropriate to dismiss the appeal and remit for reconsideration under s112 of the *Sentencing Act 1979* (NT) (correction of errors) as there was doubt as to the Supreme Court's power to do so and as there had been a substantial miscarriage of justice in terms of s177(2)(f) of the *Local Court (Criminal Procedure) Act 1928* (NT) (dismissal if no substantial miscarriage of justice)

CRIMINAL PROCEDURE – prosecution's duty of disclosure

In *Hogan v Rigby* [2020] NTSC 25, Hiley J quashed a conviction and remitted a charge for rehearing where the prosecution had failed to disclose a statement of the accused referred to in a record of interview. He said the prosecution must disclose to the defence all material that is available to it that is relevant or possibly relevant to any issue the case and the statement contained important material that related to the alleged offence. A miscarriage of justice occurs where an accused person has lost a chance which was fairly open of being acquitted by reason of a failure to apply the rules of evidence, procedure

or relevant substantive law. The statement provided a version of events that may have exculpated the appellant.

CRIMINAL PROCEDURE – service of summons abroad

In *Department of Environment and Natural Resources v Ocean Ship Management Limited & Department of Environment and Natural Resources v Gardon* [2020] NTSC 40, Kelly J held that the Local Court does not have jurisdiction to make an order for service with extraterritorial effect, whether under the *Marine Pollution Act 1999* (NT), the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Mutual Assistance in Criminal Matters (Greece) Regulations 2004* (Cth) or any other provisions. The general common law rule is that "the writ does not run beyond the limits of the State". For actions in personam, the defendant must be amenable to the command of the writ and that amenability depends on his being present within the jurisdiction. Service outside the jurisdiction is not ordinarily available in criminal matters. Legislative provisions need to be clear and unambiguous before they should be treated as authorising the service of an originating process in a criminal matter outside the jurisdiction.

CRIMINAL PROCEDURE – Suppression of identity of person unfit to stand trial

In *R v Bradley* [2020] NTSC 23, Grant CJ doubted there was power under s57 of the *Evidence Act 1939* (NT) or in the stricter inherent jurisdiction to suppress the name, proposed residence, place of employment and any other identifying particular of a person about to be released from a custodial to a non-custodial supervision order. Such orders are made in "the interests of the administration of justice" which is primarily directed to ensuring cases and trials are not jeopardised. In any case, the person was already notorious for parricide and his name had been recently republished. The court is entitled to presume that any coverage will be fair and accurate rather than sensationalist or distorted. The importance of open justice was not outweighed by the possibility of prejudice to the person.

CRIMINAL PROCEDURE – victims' compensation calculation

In *Wurramarra v An Assessor* [2020] NTSC 36, Hiley J held that, in calculating the threshold of entitlement to compensation under the *Victims of Crime Assistance Act 2006* (NT), an assessor simply adds the standard amount for each injury listed in Schedule 3 Part 2 of the Regulations without deductions for second and subsequent injuries. Deductions are only made when calculating the actual amount of compensation after entitlement is established.

ENERGY & RESOURCES, TAXES & DUTIES – costs of abandoned projects

In *Newmont Tanami Pty Ltd v Secretary for Mineral Royalties (NT)* [2020] NTSC 22, Kelly J held that some costs incurred in the development of an underground mining project that was abandoned were recoverable as "operating costs" as "eligible research and development expenditure" under ss4 and 4B of the *Mineral Royalty Act 1982* (NT). "Operating costs" under s 4 must relate to the operation of a production unit in producing the saleable mineral commodity produced by that production unit. This would not include expenditure in progressing a development which was abandoned and so was never used in the operation of the mine to produce a saleable mineral commodity. There is nothing in the scheme of the Act to suggest a legislative intention that all types of expenditure relating to a production unit should fall within one or another head of deduction. To be deductible, expenditure be used in relation to the operation of a production unit — not simply "used".

EVIDENCE – reasonable belief of police or justice?

In *Arnott v Dowd* [2020] NTSC 32, Hiley J held that evidence obtained on the execution of a search warrant was improperly excluded by the Local Court on the grounds the search warrant was obtained without a relevant reasonable belief of the police officer requesting the warrant. Hiley J held that it is the Justice of the Peace issuing the warrant to whom it must appear there are reasonable grounds for belief under s 120B of the *Police Administration Act 1978* (NT), not the police officer requesting the warrant. No evidence was called of the state of belief of the Justice and therefore the warrant was valid, the onus being on the party impugning the warrant.

INTERPRETATION – "may" and jurisdiction

In *Goldsmith Pty Ltd v GPT RE Ltd & Ors* [2020] NTSC 30, Grant CJ held that although "may" is prima facie discretionary, when used in relation to the investment of power in a court it may oblige the exercise of the power when the conditions are satisfied, particularly where the provision vests or limits jurisdiction. The provisions in ss15(1) and 18(3) of the *Local Court (Civil Procedure) Act* (NT) empowering transfer for proceedings to the Supreme Court are facultative, even though it would be rare for them not to be exercised if the court positively formed the view that a claim exceeded its monetary jurisdictional limit.

MENTAL HEALTH – involuntary admissions for custodial inmates

In *KMD v The Mental Health Review Tribunal & Anor* [2020] NTSC 13, Barr J allowed an appeal from the Mental Health Review Tribunal which found the appellant "is likely to cause serious harm" despite her being subject to a custodial supervision order. "Is likely to" in s 14(b)(ii)(A) of the *Mental Health and Related Services Act 1998* (NT) looks to the present or short term. It was highly improbable, if not impossible, for the appellant to be released early to the community from her indefinite incarceration, of which the Supreme Court was the gatekeeper. Her likelihood of causing harm was to be determined in her present custodial environment.

SENTENCING – avoiding mandatory minimums

In *Norris v The Queen* [2020] NTCCA 8, the Court of Criminal Appeal upheld a discounted sentence of five years and eight months with four years non-parole for possession of about 137 grams of methamphetamine. A mandatory minimum non-parole was required for head sentences of more than five years. The court said a sentencing court may, but is not required to, fix a head sentence at the lower end of the range having regard to the operation of a mandatory minimum non-parole period, but cannot fix a head sentence which is outside range; and it is not permissible for a sentencing court to structure or otherwise fix a sentence in order to avoid the application of a mandatory minimum non-parole period.

SENTENCING – concurrency considerations

In *Bianamu v Rigby* [2020] NTSC 43, Grant CJ repeated principles stated in *Thomas v The Queen* [2017] NTCCA 4 that sentences for multiple offences should be made concurrent where there is a single episode of criminality reflected by the sentence for one offence rather than two or more discernible courses of criminal conduct constituting "separate invasions of the community's right to peace and order". Temporal proximity is not conclusive, particularly in offences of violence involving separate attacks and/or separate victims.

SENTENCING – crown appeal – serious harm and MDMA possession

In *R v Simpson* [2020] NTCCA 9, the Court of Criminal Appeal increased sentences for causing serious harm from three years to four years and six months suspended after 18 months, and for possession of MDMA from seven days to a period to be determined, to be served concurrently. The victim suffered catastrophic injuries including severe traumatic brain injury, extensive fractures to the base of the skull and neck bones, and lung inflammation from aspiration of fluid. The court said that where a defining feature of the offence is the harm to the victim, the seriousness of the harm caused must play a significant role in determining the objective seriousness of the offence. The minimum sentence for possession of MDMA is 28 days.

SENTENCING – culpability of intentional or reckless

In *Hillen v The Queen* [2020] NTCCA 4, the Court of Criminal Appeal held that where both intention and recklessness are sufficient to form the metal element of an offence, and the same maximum penalty applies, then both can be considered as equally blameworthy. The sentencing judge was not required to make a finding as to whether the conduct was intentional or reckless and, in any case, the evidence overwhelmingly indicated it was intentional.

SENTENCING – home detention order after imprisonment

In *R v Bennett* [2020] NTSC 49, Hiley J held that a court does have the power to impose a home detention order suspending a sentence which has already been, or is to be, partly served by actual

imprisonment under s 7(h) of the *Sentencing Act 1995* (NT).

SENTENCING – incompetence of counsel

In *Bianamu v Rigby* [2020] NTSC 43, Grant CJ dismissed an appeal based on the incompetence of counsel, holding that it is available as a ground of appeal against "sentence" under s163(1)(a) of the *Local Court (Criminal Procedure) Act* (NT). The inquiry is an objective one and it must be shown that the alleged incompetence resulted in a miscarriage of justice, not whether it was the result of significant fault, flagrant incompetence or egregious error. It is not an examination of what counsel did not know or think about; but of what did or did not happen during the course of the proceedings and whether a miscarriage of justice was occasioned. A miscarriage will be rare simply because of a defect in submissions made by defence counsel, but it may occur where material relevant to the sentence is not produced, or where the judge has failed to give any consideration at all to the available sentencing options. It is the responsibility of defence counsel to ensure all necessary submissions and evidence in mitigation are placed before the court; and a "firm application" for an adjournment should be made where defence counsel considers it is necessary to obtain some form of pre-sentence report.

HIGH RISK OFFENDERS – rape sentence – unfit to stand trial

In *R v KG* [2020] NTSC 24, Grant CJ sentenced a 16 year old boy with significant intellectual disability and severe functional impairment secondary and a history of sexually dysfunctional behaviours, who had been declared unfit to stand trial, to 2 years and 10 months custodial supervision under s 43ZA(1)(a)(i) of the *Criminal Code 1983* (NT) for momentary digital penetration through clothing. The average head sentence for rape in the Territory was 6 years and 5 months where punishment and deterrence were the principal sentencing purposes but here protection of the community was more important. His previous dysfunctional behaviours were not treated as prior criminal history but bore on his character, his prospects of rehabilitation and the need for community protection. A discount was given to his participation in the special hearing.

SENTENCING – recording conviction for domestic assault

In *Hardy v Rigby* [2020] NTSC 42, Hiley J upheld the recording of a conviction for a man's aggravated assault of his wife, adding to the principles stated in *Rigby v Benfell* [2020] NTCA 9 below that a conviction is a statement by the court about the offending behaviour which the court on behalf of the community denounces as being incompatible with the values of contemporary society and that sometimes the seriousness of the offending will require a conviction notwithstanding that the offender might be of otherwise unblemished character. Domestic violence in the form of strangulation of a wife is one of those offences.

SENTENCING – recording conviction for DUI

In *Rigby v Benfell* [2020] NTCA 9, the Court of Appeal said the Local Court was right to record a conviction for DUI the morning after drinking resulting in an accident and that (a) the court does not have to find good character, triviality and extenuating circumstances under s8(1) of the *Sentencing Act* before making a "non-conviction" order but must consider all three issues; (b) the provision is inclusive rather than exhaustive of the matters properly taken into account; (c) the threshold is that there is some satisfaction that one of the prescribed considerations and other circumstances would make a reasonable person consider it expedient to be lenient; (d) the existence of a prescribed state of affairs is not a "mere peg" on which to hang leniency; (e) a conviction may be necessary where the offender is mature and deterrence is being given weight, especially for breaches of regulatory or social legislation; (f) the sentencing exercise is always undertaken with regard to the impact recording a conviction may have on the offender's economic and social well-being in a general sense.

SENTENCING – second category *R v Roe Supply*

In *Chin v The Queen* [2020] NTCCA 7, the Court of Criminal Appeal reduced a sentence for supplying about 224 grams of methamphetamine from 10 years with five years non-parole to eight years and six months with four years and three months non-parole for a second category

R v Roe offender. The quantities were not as large as in more serious supply cases, there was no cross-border transportation, and the offender did not make any great profit and he was only one level above users and street dealers.

SENTENCING – violent offences – residual discretion

In *v Irwin* [2020] NTCCA 3, the Court of Criminal Appeal held that a sentence of at least five years should have been imposed on a violent offender instead of 40 months but exercised the residual discretion to dismiss the Crown appeal because the offender was young, had been released from prison for about six weeks and was participating well in a rehabilitation program which he would not receive if returned to prison.

SUCCESSION – spouse disclaiming in intestacy

In *The Estate of Gibbs* [2020] NTSC 41, Barr J granted letters of administration under s22 (1) of the *Administration and Probate Act 1969* (NT) to the daughter of an intestate deceased despite the estate being less than $350 000 (in which case the spouse was entitled to the estate) because the spouse did not appear and pray for administration and the daughter was a fit and proper person. The spouse disclaimed an interest in the intestacy, and the law recognises that a beneficiary may disclaim at any time, at least up until the issue of the grant of administration, and the disclaimed entitlement devolves on the next person or class of persons who may establish an entitlement.

SUCCESSION – beneficiary a "person under a disability"

In *The Estate of Gibbs* [2020] NTSC 41, Barr J said that a beneficiary under an intestacy who was a "person under a disability" under the *Family Provision Act 1970* (NT) might make an application for provision out of the estate if adequate provision were not available to her under the intestacy provisions contained in the *Administration and Probate Act 1969* (NT).

SUCCESSION – invalid deed of family arrangement

In *The Estate of Wilson* [2020] NTSC 29, Kelly J declined to grant letters of administration to an applicant who was proposing to administer the intestate estate in accordance with the terms of a deed of family arrangement among spouse, children and step-children who were or might be entitled to make an application *Family Provision Act 1970* (NT). It is no possible to contract out of the terms of that Act and any agreed apportionment must have the court's approval. Administration would be granted if the applicant undertook to administer the estate in accordance with the intestacy provisions of the *Administration and Probate Act 1969* (NT), after which it was a matter for the beneficiaries to make gifts if they wished.

SUCCESSION – construing wills

In *the Estate of Williams* [2020] NTSC 26, Hiley J held that a court is generally required to give effect to the testator's intentions as expressed a will and is not permitted to remake a will. The question is not what the testator meant to do when making the will, but what the written words used mean in their context. The testator's intention is gathered from the language of the will which is given its usual or ordinary grammatical meaning even if the result is harsh, eccentric or capricious. Extrinsic evidence may be used where language is meaningless or ambiguous but a court is not "entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said. Even where the will does not truly reflect the testator's intention (as espoused from extrinsic evidence), courts are hesitant to alter clear and unambiguous words used in the will. ■