

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

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CAUSATION

By Stuart Kettle

In *ACQ Pty Ltd v Cook; Aircair Moree Pty Ltd v Cook* (2009) 237 CLR 656; [2009] HCA 28 the High Court had reason to revisit the meaning of the phrase “caused by”.

Mr Cook was investigating what repair work might be required after a crop dusting aircraft collided with and brought down a power conductor passing over a field. While approaching the downed conductor he was injured by an electric arc.

The issue before the High Court was whether as a matter of statutory interpretation the injury was “caused by” ... “something that is a result of” ... “an impact with an aircraft in flight”, in accordance with section 10(1) *Damage by Aircraft Act 1999* (Cth). The trial judge had held that the injury was “caused by” something that was the result of an impact of the aircraft, in flight. That “something” was the dislodgment of the conductor from a supporting pole. The New South Wales Court of Appeal dismissed an appeal from this decision.

In the High Court, the Appellant submitted that the provision required the injury to be caused by “something” – not a series of things or a narrative of intermediate events or “the whole ensemble of circumstances that combine to bring [the Plaintiff] from his home to within 60mm of the conductor”.

The High Court cautioned that the issue of “causation, is one of the most difficult in the law, and one about which abstract discussion is seldom valuable for Courts and those who practise in them” and therefore most cases on the point are likely to be intensely fact-specific.

The Court of Appeal had applied to the section the understanding of the concept of causation expressed in *March v E&MH Stramare Pty Ltd* (1991) 171 CLR 506 in relation to the tort of negligence and applied in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525. The High Court noted it was not necessary in construing the section to rely on any analogy with what was said in those cases. However, the proposition that there can be multiple causes of the Plaintiff’s damage is uncontroversial. The causal relationship between the impact of the aircraft on the conductor and the injury to Mr Cook did not rest exclusively on a “but for” analysis.

In short, the High Court confirmed that Mr Cook’s personal injury was “caused by the dangerous position of the conductor, and its dangerous position was the result of an impact between the aircraft and it” such that his personal injury was caused by “something that is a result of an impact” of a kind mentioned within the section. The decision highlights again the complexities caused in law by simple English phrases and in determining causation in any particular factual scenario.

Clerk: Paul Walker

**Barristers
(alphabetically):**

Andrew Bouris
Tom Brennan
Kim Burke
Despina Christofis
Gary Doherty
Jason Downing
Edmund Finnane
Simon Gregory

Adrian Gruzman
Philip Hallen SC
Rhonda Henderson
Colin Hodgson
Matthew Hutchings
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Izaz Khan
Christina King

Gregory Laughton SC
David Liebhold
William McManus
Michael Meek SC
Nicholas Newton
David Parish
Andrew Reoch
Andrew Robins
Patrick Rooney
Geoffrey Rundle

James Thomson
Martin Watts
David Weinberger
Julie Wilcsek
Craig Wilson
Michael Windsor SC
Christopher Wood
Steven Woods

CORPORATIONS – Schemes of Arrangement - Section 411 put through a Yoga Course: *In the matter of Opes Prime Stockbroking Limited* [2009] FCA 813; *Fowler v Lindholm, in the matter of Opes Prime Stockbroking Limited* [2009] FCAFC 125.

The scope for schemes of arrangement and reconstruction under Pt 5.1 the Corporations Act appears to be bendier and more flexible than many previously thought. Part 5.1 now extends to sanction extinguishment of creditors' claims against third parties where there is a sufficient nexus between the release and the relationship between the creditor and the scheme company.

Prior to the *Opes Prime Stockbroking Limited* case, it had been held that a release of a guaranteed debt effected by a Part 5.1 scheme could not affect the rights of the creditor against the third party guarantor: *Re Buildmat (Australia) Pty Ltd and the Companies Act* (1981) 5 ACLR 689.

Finkelstein J took a different view, in the *Opes Prime Stockbroking Limited* case, which decision was upheld by the Full Court on appeal in *Fowler v Lindholm* (both citations above).

The scheme included terms under which creditors' claims against certain banks were barred and released. Such a provision was held to be not beyond power under s 411. This feature did not render the proposed scheme of arrangement a "scheme of confiscation", since the amount being contributed to the scheme fund by the banks was assumed to be significantly larger than might otherwise be available without such terms. Hence, the creditors whose claims were being extinguished were taken to be receiving some compensation by participating in a larger pool of assets. Even without separate provision or entitlement for loss of the rights against the third parties, this met the requirement that there be some element of compromise or compensation in exchange for the extinguishment of third party rights to avoid the impermissible characterisation.

... But don't try this under Pt 5.3: *City of Swan v Lehman Brothers Australia Ltd* [2009] FCAFC 130

In this more recent case, a differently constituted full bench of the Federal Court (Stone, Rares & Perram JJ) held that such a result is beyond power if attempted to be implemented as a Deed of Company Arrangement under Pt 5.3A.

Some local councils pursuing claims against Lehman Brothers Australia and related companies challenged a DOCA in the administration of Lehman Brothers Australia that purported to

extinguish their claims against related entities, and appropriate their rights against any insurers.

The full court held that the "claims" referenced in s.444D(1) refers only to claims that would have been provable on a winding up. Accordingly creditors not willing to surrender claims against parties other than the company in administration, could not be forced to do so by operation of a Deed of Company Arrangement.

Rares J at [107]-[111] & Perram J at [140]-[143] considered arguments based on the *Opes Prime* decisions in terms that plainly contest the reasoning applied and Finkelstein J's failure to follow *Re Buildmat*. The *Opes Prime* yoga course may be based on bad asanas.

By Jim Thomson

NEGLIGENCE – the "Shirt Calculus": *Roads & Traffic Authority of NSW v Refrigerated Roadways Pty Limited* [2009] NSWCA 263

In this decision, the NSW Court of Appeal allowed an appeal from a decision of Hungerford ADCJ.

Refrigerated Roadways had commenced recovery proceedings pursuant to Section 151Z of the Workers Compensation Act seeking the recovery of death benefits it had paid to the widow of Mr Mark Evans, a truck driver employed by Refrigerated Roadways who was killed when a concrete block was dropped from an overhead bridge on the F5 freeway and hit his truck.

The Court of Appeal found that whilst the RTA owed a relevant duty of care, including a duty to take reasonable care to protect motorists from harm resulting from the criminal conduct of others, that duty had not been breached in this case. Applying the *Wyong Shire Council v Shirt* 'calculus of negligence' the Court of Appeal found that the RTA had not breached its duty of care through its failure to screen the bridge at the time of its construction or through its failure to later install a screen.

By Jason Downing

ANNOUNCEMENTS

Appointments

The Hon Justice David Davies was appointed to the Supreme Court of New South Wales on 29 June 2009.

Michael Meek was recently appointed Senior Counsel.

New Reader

David Parish was recently called to the bar and joins the floor as a reader.

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