Australian Bar Review (ABR)

Volume 54 Part 2

(francis forbes society for australian history lecture and articles included in this part are linked to the LexisNexis platform)

CONTENTS

Francis Forbes Society for Australian History Lecture

Articles

In this article, based on an address at the University of Sydney Union to mark the retirement from judicial office of the Hon Justice Paul Le Gay Brereton, the author recounts the many similarities in the lives of the retiree and his father, the Hon Mr Justice Russell Le Gay Brereton. The father died in May 1974, 50 years ago. But the lives of the two judges included many engagements in a broader public service. This included voluntary service with the Australian Army in the University Regiment and beyond. It extended to activities in student affairs and on the University of Sydney Senate. Whereas the father was by-passed in a controversial supersession in judicial appointments on the creation of the New South Wales Court of Appeal in 1965, the son was later appointed to the Court of Appeal. This article celebrates the service of both. Justice Paul Brereton's public service continues as the inaugural Federal Commissioner of the National Anti-Corruption Commission. An 'intermezzo' recounts the personal encounters of father and son with the author. Behind ostensible reserve, in each case, emerges an intergenerational commitment to principled service to others.

Karger v Paul (Karger) enabled a discretionary decision of a trustee to be challenged in the courts on the basis that the trustee had made a decision other than in good faith, on a real and genuine consideration and in accordance with the purpose for which the power to make the decision was conferred. It also identified certain bases on which a decision of a trustee was not open to challenge. Greater care is now required in applying the decision in *Karger* than courts have sometimes exercised in the past. The decision applies directly only to a discretionary decision of a trustee concerning a power that the trustee undoubtedly has. There are many decisions that arise concerning the validity of a trustee's decision which are not of that type. They include socially important decisions like those involved in entitlement to superannuation benefits. Further, what is required to give "real and genuine consideration", and to act in accordance with the purpose for which a discretion was conferred, will vary significantly concerning different decisions that a trustee might be called on to make, and

depending on the terms of an individual trust instrument, so the *Karger* test is significantly incomplete. While *Karger* stated that a trustee's decision could not be challenged on the basis that the trustee has made inadequate inquiries or misunderstood the facts, the case law since *Karger* makes clear that inadequacy of inquiries or misunderstanding of the facts can be part of the evidentiary basis on which a court concludes that a trustee's decision is invalid because it was made other than in good faith, on a real and genuine consideration and in accordance with the purpose for which the power to make the decision was conferred.

In fulfilling their role of resolving cases justly and expeditiously, courts can order the separate trial of issues. However, courts have long been reluctant to do so, consistently noting the risks involved in this procedure. For this reason, the general judicial approach towards separate trials is one of caution, with a high bar needing to be met before one is ordered. Now, the recently introduced serious harm threshold in Australian defamation law significantly departs from this general approach. It imposes a presumption that serious harm, as a new element in the defamation cause of action, will be determined in a separate hearing prior to the full trial. This reform aims to promote the cost-effective and resource- and time-efficient resolution of defamation disputes. However, as with any separate trial, preliminary serious harm hearings carry risks which could undermine the purpose of the reform. This article seeks to elucidate both the benefits and risks involved in separate serious harm trials. It argues that the responsibility for ensuring that the reform's goals are achieved lies with judicial officers to effectively exercise their discretionary powers to decide whether a separate trial should be granted, refused, or ordered. In doing so, it will distil important considerations that courts must bear in mind when deciding whether a separate serious harm trial is appropriate.

Intellectual property and related cases frequently analyse images, films, or sound recordings but for various reasons these critical exhibits may be omitted from the public record. This article illustrates the benefits of publication by revealing the unreported images, screenplays and transcripts from the landmark 1963 High Court case of *Shell Co of Australia Ltd v Esso Standard Oil (Australia) Ltd*. This article argues that circulating these fragile materials is essential to our understanding of the law, and of our social and legal histories.

Recent litigation against public authorities has increasingly relied on negligence law as a means of challenging, or responding to, government action or inaction, including for activists seeking change. Twenty years ago, the Civil Liability Act 2002 (NSW) was enacted, together with its interstate equivalents, to limit liability for negligence generally and, especially in Part 5 of that Act, for public authorities. However, there is a dearth of scholarly analysis as to the applicability of Part 5, and equally scant analysis as to its effect on liability. Recent case law suggests that it does not apply to certain public authorities, including the Commonwealth of Australia. In such circumstances, issues of

liability in negligence are typically determined accordingly to common law principles, which have received little recent scholarly attention. In that context, I investigate the extent to which Part 5 does apply to public authorities and analyse the relevant common law principles, before suggesting that the effect of Part 5 is, at best, limited. I posit that, other than for s 43A, Part 5 is mostly a restatement of the common law and does not represent a significantly preferable regime for public authorities, despite various claims to the contrary.