In such a case the court indicated that it will rarely be appropriate for no conviction to be recorded and that a conviction cannot be avoided only because the offender is involved in a driver education course. Further, the automatic disqualification period is appropriate unless there is good reason to reduce it. A good reason may include employment, absence of viable alternative transport or sickness of the offender or another person.

The guideline judgment also dealt with a second or subsequent HRPCA offence and the factors increasing the 'moral culpability' of a HRPCA offender e.g. the degree of intoxication above 0.15, collision with another object.

A combination of repeat offending and an increase in moral culpability required a term of imprisonment of some kind leading to full-time custody.

Subramanian v The Queen (2004) 79 ALJR 116; 211ALR 1

The High Court in *Subramanian* dealt with the procedure at a so-called 'fitness hearing' under the *Mental Health (Criminal Procedure) Act 1990* (NSW).

After a lengthy court history, in November 2001 the NSW attorney general directed that a special hearing be conducted of charges against the appellant under s19 of the Act. For that purpose a special hearing commenced in 2002 before a judge and jury in the District Court.

The High Court in its judgment found that the special hearing had not been conducted in compliance with the Act, in particular s21(4). Those requirements the court said were mandatory and the Act required them to be not just touched upon but explained. Section 21(4) of the Act is in the following terms:

> At the commencement of a special hearing, the court must explain to the jury the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts which are available and the legal and practical consequences of those verdicts.

At page 124 of the report the court has set out a draft direction to be followed by a trial judge allowing for adaptation to the facts of a particular case.

Interestingly enough at p125 of the judgment the court indicated that it was unable to immediately see the purpose behind such a detailed explanation to the jury of the purpose of a special hearing but suggested it may be to reassure the jury regarding the future conduct of the case following their verdict.

By Keith Chapple SC

Recent commercial cases

Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 79 ALJR 129; 214 ALR 644

This case, decided by the High Court on 11 November 2004, was an appeal from the NSW Court of Appeal (Sheller JA, Young CJ in Eq, Bryson J) raising two issues:

(a) first, whether an exclusion clause and/or an indemnity clause contained within the terms and conditions on the back of a signed application for credit formed part of a contract of carriage made between the appellant ('Finemores') and the third respondent ('Thomson'); and

(b) secondly, if so, whether the exclusion clause bound the first respondent ('Alphapharm') on the footing that Thomson entered into the contract of carriage as Alphapharm's agent.

The first of these is referred to as the 'terms of contract issue', the second as the 'agency issue'.

The material facts were as follows. Under a sub-distribution agreement with the second respondent ('Ebos'), Alphapharm was the exclusive distributor of an influenza vaccine ('Fluvirin') in Australia. Ebos arranged for Thomson to look after collection, storage and regulatory approval for the Fluvirin sent to Australia. Thomson proposed to Alphapharm that Alphapharm use Finemores, which Thomson was using to transport the Flurivin from Sydney airport to Finemores' Sydney warehouse, to transport the Fluvirin from the Sydney warehouse to Alphapharm's customers. Alphapharm agreed and left it to Thomson to enter such contractual arrangement with Finemores as was necessary for this.

Having been informed by Thomson of the transport and storage requirements for Fluvirin, on 12 February 1999 Finemores faxed a quotation to Thomson. The covering letter invited Thomson, if it accepted the quotation, to complete Finemores' credit application and sign its freight rate schedule. On 15 February 1999, Thomson informed Alphapharm of its decision to engage Finemores. On 17 February 1999, at Finemores' premises, Thomson's operations manager completed and signed Finemores' credit application and signed the freight rate schedule. Immediately above the place for signing on the credit application appeared the statement 'Please read 'conditions of contract' (overleaf) prior to signing'. Those conditions of contract contained the exclusion and indemnity clauses in question. They were not read by Thomson's operations manager before he signed the credit application.

The relevant clauses of the conditions of contract were clauses 5, 6 and 8. Clause 5 provided:

> 5. The customer warrants that in entering into this contract it does so on its own account as agent for the customer's associates.

Clause 6 relevantly provided:

> 6. Notwithstanding any other clause of this contract…under no circumstances shall the carrier be responsible to the customer for any injurious act or default of the carrier, nor, in any event, shall the carrier be held responsible for any loss, injury or damage suffered by the customer either in respect of:
>
> (a) the theft, misdelivery, delay in delivery, loss, damage or destruction, by whatever cause, of any goods being carried or stored on behalf of the customer by the carrier at any time (and regardless of whether there has been any deviation from any agreed or customary route of carriage or place of storage);
>
> (b) any consequential loss of profit, revenue, business, contracts or anticipated savings; or
>
> (c) any other indirect consequential or special loss, injury or damage of any nature and whether in contract, tort (including without limitation, negligence or breach of statutory duty) or otherwise.

In this clause 'customer' includes the customer's associates.'

Clause 8 relevantly provided:

> 8. The customer agrees to indemnify the carrier…in respect of:
>
> (e) any demand or claim brought by or on behalf of the customers' [sic] associates arising out of, related to, or connected with this contract.

There was no dispute that under the conditions of contract, Finemores was 'the carrier', Thomson was 'the customer' and Alphapharm one of 'the customer's associates'.

Two shipments of Fluvirin were damaged while in Finemores' custody and Alphapharm (rather than Ebos) was on risk. One shipment was damaged while being transported from Sydney to Queensland by Finemores. The other was damaged while in storage at Finemores' Sydney warehouse. In both cases, the damage resulted from the Fluvirin, which was sensitive to changes in temperature, being exposed to the wrong temperatures. The result of the damage to these shipments was that the intended recipients rejected them.

Alphapharm, accordingly, sued Finemores for damages.[1] Finemores relied on the exclusion clause in the conditions of contract against Alphapharm and cross-claimed against Thomson relying on the indemnity clause. Alphapharm said that the exclusion clause was not a term of the contract between Finemores and Thomson and that, in any event, Thomson had not contracted with Finemores as Alphapharm's agent. Thomson said that the indemnity clause was not a term of its contact with Finemores.

At trial, and unanimously in the Court of Appeal, Finemores lost. It won, unanimously, in the High Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ delivering a joint judgment). The High Court's judgment focused on the exclusion clause, there being no issue about the indemnity clause if Alphapharm was bound by the former clause.

On the terms of contract issue, the court stated (at [57]) the general rule which applied in these terms:

> where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document.

The courts below had not applied this rule. Rather they had held that the critical question was whether Finemores had given Thomson reasonably sufficient notice of the conditions (including the exclusion clause) on the reverse side of the application for credit. This approach involved an application of the principles relating to ticket cases to a signed contract, something which had been rejected by Scrutton LJ in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 at 403. The High Court, too, rejected that approach.

Two other particular aspects of the court's reasoning on the terms of contract issue warrant attention. First, it was noted that much of the evidence consisted of largely irrelevant information about the subjective understanding of the individual participants in the dealings between the parties. Uncritical reception of such inadmissible evidence, the court said, 'is strongly to be discouraged' (at [35]). Secondly, the court's reasoning reinforces the dominance of the objective theory of contract and gathers together a number of authorities on that subject (at [36]-[49], generally).

The agency issue had been decided against Finemores by the trial judge, but was not considered in detail by the Court of Appeal because of its decision on the terms of contract issue. The High Court's resolution of the issue in favour of Finemores did not turn on any question of principle, but on a reconsideration of the evidence. Noting that, at the very least, rates of freight and terms of payment had to be agreed between Finemores and Alphapharm, the court held (at [81]) that the evidence compelled the conclusion that Alphapharm had authorised Thomson to contract with Finemores and to agree on these matters and such other standard terms and conditions as Finemores required.

In the result, the Finemores appeal was allowed and the orders of the trial judge and the Court of Appeal set aside.

By Matthew Darke

[1] In fact, Ebos joined Alphapharm in suing Finemores, and the trial judge gave judgment in favour of both of them. It was common ground in the High Court that judgment should have been entered in favour of Alphapharm only.