ESTOPPEL

Taylor was not estopped for not raising the civil claim in the High Court proceedings, as this was not unreasonable.[20]

DAMAGES

Relevant considerations in assessing damages for false imprisonment include:[21]

- The period of deprivation of liberty.
- Damages cannot be computed on the basis that there is some kind of applicable daily rate.
- A substantial proportion of the ultimate award must be given for 'the initial shock of being arrested'.
- As the term of imprisonment extends, the effect upon the person falsely imprisoned progressively diminishes.

The appellants' damages appeal failed,[22] as did Taylor's cross-appeal on quantum and his claim for aggravated and exemplary damages.[23] The primary judge's assessment was 'within the range, albeit at the bottom of the range'.[24] Exemplary and aggravated damages were not available[25] - the ministers and officers were not 'guilty of behaving contumeliously, arrogantly or outrageously'.[26] PL

Endnotes: **1** *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391. **2** *Ruddock v Taylor*[2003] NSWCA 262 at [3]. **3** See also Ipp JA at [95]. **4** Spigelman CJ at [41], [56]; Meagher JA at [83]; Ipp JA at [84]. **5** [3]–[4]. **6** See also Meagher JA at [73]. **7** Spigelman CJ at [28]-[40]. **8** Spigelman CJ at [33]. **9** Spigelman CJ at [24]. **10** Spigelman CJ at [11]-[12]; [25]-[26]. **11** Spigelman CJ at [39]-[40], citing *Scott v Shepherd* (1773) 2 Wm Bl 892; 66 ER 525; see also Meagher JA at [72]. **12** [85]. **13** [86]-[88]. **14** [89]. **15** [94]. **16** [95]. **17** s 189 *Migration Act* 1958 (Cth). **18** Spigelman CJ at [14]-[21]; see also Meagher JA at [67]-[69]. **19** Spigelman CJ at [18]; Meagher JA at [69]. **20** Spigelman CJ at [42]-[44]; Meagher JA at [82] citing *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. **21** Spigelman CJ at [48]-[49]. **22** Spigelman CJ at [46]-[47]; Meagher JA at [81]. **23** Spigelman CJ at [55]-[56]; Meagher JA at [81]. **24** Spigelman CJ at [50]. **25** Spigelman CJ at [53]-[55]; Meagher JA at [81]. Taylor's case for aggravated and exemplary damages was based on his spending most of his detention in a state prison rather than in an immigration facility (he had previously committed sexual offences against children). **26** Meagher JA at [81].

JOEL SHELDRICK AND BRIAN NUGAWELA, WA

Abrogation of rights

Dossett v TKJ Nominees Pty Ltd [2003] HCA 69

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In its decision in *Dossett v TKJ Nominees*, the High Court enforced the notion that legislatures cannot retrospectively abrogate rights without manifesting a clear and unambiguous intention to do so.

Dossett involved a Western Australian worker who was injured in the course of his employment in December 1996. Under the prevailing legislative regime, Mr Dossett was required to obtain the leave of the District Court of Western Australia in order to pursue a common law action in negligence against his employer with respect to his work accident. The court was required to grant leave if Mr Dossett successfully demonstrated a future

pecuniary loss in excess of a prescribed threshold.

On 1 July 1998, the worker applied for such leave. His pending application, had not been determined when, on 5 October 1999, Royal Assent was given to the amending legislation which repealed the former regime and instead imposed a stricter threshold.

The District Court thereafter dismissed Mr Dossett's leave application given the imposition of the new regime. Mr Dossett's appeal to the Full Court of the Supreme Court of Western Australia was dismissed, that court focussing upon the savings provisions in the amending legislation. Importantly, the amending legislation provided that actions which had commenced, or for which leave to commence had been granted, would not fall under the new regime. Specific provision was not made for those whose leave applications had been commenced but not heard or determined as at the passage of the amending legislation. On that basis, the Western Australian courts held that the lack of a specific savings provision for this instance meant that parliament had intended that the new regime would apply.

The question under consideration before the High Court was whether the amending legislation intended to abrogate Mr Dossett's right to pursue his leave application under the old regime. By a unanimous decision, the High Court upheld the appeal from the Full Court's decision.

In his judgment, Kirby J stated: 'Having invoked the courts, the appellant would usually be entitled to expect that his rights would not be altered whilst his application to the courts was pending, awaiting determination. Where changes are effected in ways that have an impact upon already accrued legal rights, privileges and entitlements, statutory exceptions are commonly made to exclude those that are the subject of pending proceedings.'

His Honour also referred to the strong historical common law presumption against retrospectivity.

Crucial to the unanimity's decision, however, was the provision in section 37(2) of the *Interpretation Act* 1984 (WA), which effectively provides that savings provisions in amending legislation cannot be used to rebut the statutory presumption. Section 37(2) is unique to Western Australia, although it should be said that its (weaker) common law analogue has been applied in other Australian jurisdictions. If a savings provision does not 'cover the field', then one cannot derive from it an intention to rebut the statutory presumption against retrospectivity.

The decision in *Dossett*, while extremely positive for workers with pending leave applications (and arguably those who have not even filed their applications but are not yet statute-barred), does not take the presumption against retrospectivity beyond what is firmly established common law principle. Nonetheless, the decision serves to reinforce that principle at a time of increasing legislative interference with pre-existing rights, not only in the area of personal injuries litigation. If parliament wishes to retrospectively abolish citizens' rights (as the insurer in Mr Dossett's case argued it did), it must do so clearly and in broad daylight, and arguably face what Kirby J referred to as 'political accountability' at the polls. PL