



Court of Appeal New South Wales

Medium Neutral Citation: Sydney Local Health Network v QY and QZ [2011] NSWCA 412

Hearing Dates: 20 May 2011

Decision Date: 20/12/2011

Jurisdiction:

Before: Campbell JA at [1]
Macfarlan JA at [75]
Young JA at [78]

Decision: (1) Leave to appeal granted.
(2) Appellant to file notice of appeal in the form of the final draft of 21 June 2011 within seven days.
(3) Appeal allowed.
(4) Order that the claim of the respondents be summarily dismissed.
(5) Order that the respondents pay the appellant's costs of the appeal.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords: CIVIL LIABILITY - whether a doctor conducting a post mortem is protected from liability under the Coroners Act

STATUTORY INTERPRETATION - Anti-Discrimination Act ss 4 and 49B - whether "person" includes a "deceased person"

STATUTORY INTERPRETATION - Anti-Discrimination Act s 4 - whether "associate" includes a past associate of the aggrieved person - wording of definition is unambiguous - "associate" only include those who are presently associates

STATUTORY INTERPRETATION - Anti-Discrimination Act ss 4, 49M - whether "service" includes the performance of a post mortem - whether a particular matter is a "service" is a question of fact

Legislation Cited: Administrative Decisions Tribunal Act 1997
Anti-Discrimination Act 1977 ss 4, 7, 8, 20C, 20D, 38S, 38T, 49B, 49M, 49ZT, 49ZTA, 49ZXB, 49ZXC, 88, 89A, 93A, 95, 108
Anti-Discrimination (Amendment) Act 1994
Coroners Act 1980
Human Tissue Act 1983
Interpretation Act 1987 ss 5, 21
Judicial Officers Act 1986
Status of Children Act 1996

Cases Cited: Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27
AW v CW [2002] NSWSC 301; 54 NSWLR 445
Commissioner of Police v Mohamed [2009] NSWCA 432
Commissioner of Police v Russell [2001] NSWSC 745
Commonwealth of Australia v Griffiths [2007] NSWCA 370; 70 NSWLR 268
Commonwealth of Australia v Wood [2006] FCA 60; 148 FCR 276
Council of the Municipality of Randwick v Rutledge (1959) 102 CLR 54
CUNA Mutual Group Ltd v Bryant [2000] FCA 970; 102 FCR 270
Director-General DOCS v MM & AM [2003] NSWSC 1241; (2007) EOC 93-464
Farah v Commissioner of Police [1998] QB 65
Foley v Phelps 37 NYS 471 (1896)
Harris v Lewisham and Guy's Mental Health NHS Trust [2000] EWCA 52; 3 All ER 769
Harrison v Melhem [2008] NSWCA 67; (2008) 72 NSWLR 380
Hastings Co-operative Ltd v Port Macquarie Hastings Council [2009] NSWCA 400; 171 LGERA 152
IW v City of Perth [2997] HCA 30; 191 CLR 1
Jones v Kaney [2011] UKSC 13; 2 WLR 823
Kelly v R (2004) 218 CLR 216

Manly Council v Malouf [2004] NSWCA 299
Palenzke v Bruning 98 Ill App 644 (1900)
Preston v Commissioner of Fair Trading [2011] NSWCA 40
R v Peters (1886) 16 QBD 636
Rainsford v Victoria [2005] FCAFC 163; 144 FCR 279
Rainsford v Victoria [2007] FCA 1059; 167 FCR 1
Rainsford v Victoria [2008] FCAFC 31; 167 FCR 26
Re Bolton; Ex parte Beane (1987) 162 CLR 514
Re Dingjan; Ex Parte Wagner [1995] HCA 16; (1995) 183 CLR 323
Rushing v Medical College of Georgia 62 SE 563 (1908)
Saeed v Minister for Immigration and Citizenship [2010] HCA 23; (2010) 241 CLR 252
San v Rumble (No 2) [2007] NSWCA 259
Savjani v Inland Revenue Commissioners [1981] QB 458
Stephenson v Human Rights and Equal Opportunity Commission (1996) 68 FCR 290
Waters v Public Transport Corporation [1991] HCA 49; 173 CLR 349

Texts Cited: D C Pearce & R S Geddes, Statutory Interpretation in Australia 7th ed (2011)
Jackson, The Law of Cadavers (Prentice Hall Inc, New York, 1936)

Category: Principal judgment

Parties: Sydney Local Health Network (formerly Sydney South West Area Health Service) (Appellant)
QY (First Respondent)
QZ (Second Respondent)

Representation: Solicitors
GILD Insurance Litigation Pty Ltd (Appellant)
HIV/AIDS Legal Centre Incorporated (Respondents)

Counsel
Dr M A Perry QC and L A Clegg (Appellant)
Dr C S Ward and S J Walsh (Respondents)

File Number(s): CA 2010/244324

DECISION UNDER APPEAL

Court/Tribunal: Administrative Decisions Tribunal (Appeal)

Before: K P O'Connor DCJ (P); D Patten (DP); B Field

Date of Decision: 29/06/2010

Medium Neutral Citation: QY & QZ v Sydney South West Area Health Service (EOD) [2010] NSWADTAP 48

Court File Number(s): ADTAP 109003

JUDGMENT

1 **CAMPBELL JA :**

Introduction

- 2 I have had the advantage of reading the reasons of Young JA. I have reached the same conclusion as his Honour concerning the fate of the appeal, but on narrower grounds. I am not persuaded that it is only a living person who can be a "person" within the meaning of the **Anti-Discrimination Act 1977** ("**the Act**"). However an "associate" of a person within the meaning of the Act must be a person who is living at the time that the discrimination in question is alleged to have occurred. That is a sufficient reason why there has been no contravention of the Act in the present case.
- 3 I agree with Young JA that leave to appeal should be granted.
- 4 There is no occasion for me to restate the facts, or all of the relevant statutory provisions. However, it may be useful to set out the provisions of greatest importance.
- 5 At the time of the action constituting the alleged discrimination, s 4 provided:

"**associate** of a person means:

- (a) any person with whom the person associates, whether socially or in business or commerce, or otherwise, and

(b) any person who is wholly or mainly dependent on, or a member of the household of, the person.

...

relative of a person means any person to whom the person is related by blood, marriage, affinity or adoption."

- 6 Section 49M was the section under which QY and QZ claimed that the DOFM had discriminated against them. The wording of s 49M that identifies the particular contravention that QY and QZ alleged is:

"It is unlawful for a person who provides ... services to discriminate against a person on the ground of disability ... by refusing to provide the person with those ... services ..."

- 7 Section 49B(1) defines what is to count as discrimination on the ground of disability. That section relevantly provides:

"A person (**the perpetrator**) discriminates against another person (**the aggrieved person**) on the ground of disability if, on the ground of the aggrieved person's disability or the disability of a relative or associate of the aggrieved person, the perpetrator:

(a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have that disability or who does not have such a relative or associate who has that disability...

- 8 The contravention of s 49M(1) is said to have occurred at the time that DOFM returned B's body to them in an unreconstructed state. It is said to have occurred because, at that time:

(1) QY and QZ are associates of B; and

(2) On the basis of B's disability (constituted by being HIV-positive), the DOFM treats QY and QZ (by returning B's body unreconstructed) less favourably than it would have treated a person whose associate had no disability

- 9 This gives rise to a problem about whether, at the time of the discrimination, B fitted the definition of "*associate*" of QY and QZ. Whether the definition was satisfied depends upon two things - whether B was at that time "*a person*" within the meaning of the Act, and whether at that time B was a person "*with whom QY associates*" and a person "*with whom QZ associates*".

Meaning of "Person" within the *Anti-Discrimination Act 1977*

- 10 The Appellant argued that the correct construction of the term "*person*" in the Act was restricted to living persons. The Respondents however contended that the scope of the term "*person*" extended to deceased persons. While the immediate issue is the appropriate interpretation of the term "*person*" as it is used in the definition of "*associate*", the Respondents eschewed any submission that the term should be treated differently in the s 4 definition of "*associate*" to its use in the rest of the Act. Though this has not been the subject of argument, my own reading of the Act suggests that the term "*person*" is used with a consistent meaning throughout the Act.

- 11 There is no definition of the term "*person*" within the Act. However, the term "*person*" is included as a "*commonly used term*" in s 21 of the *Interpretation Act 1987*. That section provides:

"(1) In any Act or instrument:

...

person includes an individual, a corporation and a body corporate or politic."

- 12 The definition in the *Interpretation Act* is not decisive for two reasons. First, the term is not defined exhaustively, so does not exclude deceased persons from the ambit of the term. Secondly, s 5(2) *Interpretation Act* relevantly provides that the *Interpretation Act* applies to an Act except in so far as the contrary intention appears in the Act.

- 13 The term "*individual*" is also defined in s 21 *Interpretation Act*, but that definition simply distinguishes between natural persons (those who exist through the force of nature) and artificial persons such as corporations (those who exist through the unnatural means of legislation). In any case, the fact that the term "*individual*" is only one aspect of the non-exhaustive definition of "*person*" means that the definitions of "*person*" and "*individual*" in the *Interpretation Act* advance neither side's position.

- 14 Therefore, a detailed examination of the Act and the meaning of the term "*person*" are required to determine whether the submission of the Appellant or that of the Respondents is preferable.

- 15 Dictionaries may be used to assist in establishing the meaning of a term in an Act: D C Pearce & R S Geddes, *Statutory Interpretation in Australia* 7th ed (2011) at [3.30]; *Manly Council v Malouf* [2004] NSWCA 299 at [8]-[9], *R v Peters* (1886) 16 QBD 636 at 641. However, they are never conclusive. Dictionary definitions often offer a range of meanings of a word. Where a word has a range of meanings, the word must be interpreted in the context in which it appears in the statute, and by reference to the purpose of the statute. Further, dictionaries sometimes fail to capture all

the specialised or technical, or recently acquired, shades of meaning of a word.

16 The *Macquarie Dictionary* defines "*person*" when used as a noun, as:

1. a human being, whether man, woman or child: *the only person in sight*
2. a human being as distinguished from an animal or a thing
3. *Philosophy* a self-conscious or rational being
4. the actual self or individual personality of a human being: *to assume a duty in one's own person*
5. the living body of a human being, often including the clothes worn
6. the body in its external aspect
7. a character, part or role, in a play, story or in real life, etc
8. an individual of distinction or importance
9. *Colloquial* someone not entitled to social recognition or respect: *that person* !
10. *Law* any human being or artificial body of people, having rights and duties before the law

17 The fifth of these meanings can clearly apply only to a live human being, but many of the others would be equally capable of applying to the living and the dead.

18 It can be equally useful for a judge to consider his or her own understanding of ordinary English usage. As a matter of ordinary usage of language, there is no oddity about "*person*" extending to a person who is dead. One can say "*Lachlan Macquarie is the most important single person in Australian history*", or "*Uncle Max*" (now dead) "*is the person who had the most influence on my becoming a lawyer*". If a medical questionnaire asks "*Has any person to whom you are related ever had cancer?*", the information the questioner is likely to find useful, and that the question calls for, may include information about people who are dead.

19 I turn to consider the context of the Act to see whether it provides a reason for narrowing the ordinary meaning of "*person*". The Act is divided into Parts, numbered from 1 to 10. Some Parts are numbered in a way that betrays their origin as insertions into the Act after its first enactment, e.g. "*Part 4B - discrimination on the grounds of a person's responsibilities as a carer*".

20 "*Part 1 - Preliminary*" contains definitions and rules for application of the Act. In broad terms, each of "*Part 2 - Racial Discrimination*" to "*Part 4C - Discrimination on the Ground of Homosexuality*" and "*Part 4G - Age Discrimination*" follows a common pattern of identifying what is to count as discrimination on the ground of Y, and identifying circumstances in which discrimination on the ground of Y is unlawful. From Part 8 to the end the Act contains provisions relating to the enforcement and administration of the Act, and does not contain any prohibitions of discriminatory behaviour.

21 There are many provisions in the Act in which the word "*person*" is used that could apply only if "*person*" referred to a living person. However, for assistance in ascertaining the meaning of "*person*" in the Act, one needs to examine closely why that is so.

22 Many of the definitions of what is to count as discrimination on the ground of Y follow a common form. A typical example is s 7(1), which provides:

"A person (*the perpetrator*) discriminates against another person (*the aggrieved person*) on the ground of race if, on the ground of the aggrieved person's race or the race of a relative or associate of the aggrieved person, the perpetrator:

(a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different race or who has such a relative or associate of a different race, or
..."

23 The definition goes on to list two other alternative ways in which the aggrieved person has been treated differently to the way in which a person not of the aggrieved person's race, or a person who did not have a relative or associate of the same race as the relative or associate in question of the aggrieved person, would have been treated. Section 49B is a definition that follows this common pattern.

24 There is an extended definition in s 7(2) of when something is done on the ground of a person's race. Section 7(2) provides:

"For the purposes of subsection (1)(a) and (b), something is done on the ground of a person's race if it is done on the ground of the person's race, a characteristic that appertains generally to persons of that race or a characteristic that is generally imputed to persons of that race."

25 Similar extended definitions appear in other Parts of the Act, concerning discrimination on grounds other than race. Section 49B(2) follows this pattern concerning discrimination on the ground of disability.

26 Three points emerge from this consideration of what counts as discrimination on the ground of Y. The first is that it must be *the aggrieved person* who is treated less favourably. The second is that it is *by reason of a characteristic of*

the aggrieved person that he or she is treated less favourably. The third is that the relevant characteristic of the aggrieved person might be that it is *he or she who is* of a particular Y, or it might be a *relative or associate* of the aggrieved person *who is* of the particular Y.

- 27 As a matter of ordinary language, there are some activities concerning which it would be an ordinary use of language to say that the person had been discriminated against on the ground of race, in the sense required by s 7(1), even if that person was dead. It is an ordinary use of language to say that a dead ex-serviceman is a person who has been discriminated against on the ground of race if his name has been left off the war memorial because he was black. It is an ordinary use of language to say that someone is a person who has been discriminated against on the ground of race if (after his death) he is not permitted to be buried in some particular place because his grandmother was of a particular racial group.
- 28 The expression "*the aggrieved person*" ordinarily brings with it the notion that the person in question has a grievance, in the sense of a complaint that he or she has been improperly treated, and in relation to which he or she wants action to be taken. It is only a living person who can have a complaint, or want action to be taken. Thus, in ordinary usage only a living person can be, now, an aggrieved person. But in s 7(1) "*the aggrieved person*" is a defined term that has been defined by an exhaustive definition. I recognise that the definition in s 7(1) (and also in s 49B(1)) is in the form "*a person ... discriminates against another person ... on the ground of Y if ...*", and that it does not use the phrase "*if and only if*". Nonetheless it should properly be understood as an exhaustive definition. Because it is such a defined term, it is the words of the definiendum that give it its meaning. The meaning of a defined term is not the meaning that it would have in ordinary speech if it were not such a defined term.
- 29 For these reasons, in my view the common form of these definitions is not sufficient to lead to the conclusion that a person can be discriminated against on the ground of Y only if that person is alive.
- 30 Many of the prohibitions of the Act are cast in the form: "*It is unlawful for an X to discriminate against a person on the ground of Y in (or by) activity Z*". I will refer to that as "*the Common Form Prohibition*". In prohibitions in that form, the "X" identifies the type of person or institution that is forbidden to engage in the conduct, the "Y" is a characteristic that the aggrieved person has or is thought to have, and the "Z" is a type of activity in which the aggrieved person wishes to engage, or an aspect of such an activity.
- 31 In fact, the items that the legislature has chosen to fill the role of "Z" are all such that the prohibition has work to do only in connection with discrimination that is practiced against a person who is alive at the time that the discrimination occurs. For example, one of the prohibitions in s 8(1) of the Act is:
- "It is unlawful for an employer to discriminate against a person on the grounds of race ... in determining who should be offered employment ..."
- 32 While it might be possible to discriminate against a dead person on the grounds of race in connection with some types of activity, dead people are never offered employment. Therefore it is not possible for an employer to breach s 8(1) concerning a dead person, insofar as the race of the person being offered employment is an alleged ground of discrimination. (I consider later the race of a relative or associate of the aggrieved person as a ground of discrimination.)
- 33 On looking through the Act, I have come to the view that the activities which make up the "Z" in the Common Form Prohibitions are all activities that can only be engaged in by a living person. I have been unable to find a contrary example. The activities include such matters as obtaining work, becoming a partner, becoming a member of a union or a club, obtaining a trade or professional qualification, obtaining the services of an employment agency, becoming a student at an educational institution, obtaining goods or services, obtaining accommodation, and engaging in sporting activity. Thus, concerning all of these Common Form Prohibitions, there will only be a contravention when the aggrieved person is a living person.
- 34 However, while that affects the scope of operation of many of the provisions of the Act, it does not necessarily have the consequence that "*person*" in the Act cannot include a dead person. The meaning of a word is not identical with the range of circumstances in which that word does work in the statute. It is a matter of fact, about the types of circumstances that Parliament has chosen as ones concerning which discrimination should be prohibited by a Common Form Prohibition that leads to this result, not anything to do with the meaning of the word "*person*" in the Act. It is the nature of what has been chosen to be Z, not the meaning of "*person*".
- 35 While very many of the prohibitory provisions of the Act are Common Form Prohibitions, not all of them are in that form. The Act contains some prohibitions on various forms of vilification. One example is s 20C(1), which provides:

"It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group."

- 36 I would expect that that prohibition would be broken if someone publicly urged desecration of the graves of people of a particular race as a way of showing that people of that race should never have been allowed into the country. Such conduct is within the words of the provision. Further, there is an understandable public policy in promoting community peace and harmony, that has been part of the law since "*breach of the peace*" was a recognised basis for creating legal wrongs in medieval times. That public policy would justify reading s 20C(1) as extending to that sort of conduct.
- 37 Breach of s 20C(1) does not result in a criminal offence being committed, but it can be the subject of a complaint to the President under s 89A provided that the special standing requirements for vilification complaints laid down by s 88 are met. If the complaint is not declined, abandoned, or successfully resolved by conciliation, it can be referred to the Tribunal under ss 93A or 95. If the Tribunal finds the complaint substantiated, it has a range of remedies open under s 108(2). They include damages, an order enjoining the respondent from continuing or repeating the conduct, ordering of an apology or retraction, and, (for a vilification complaint), ordering the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination. Prohibitions of vilification similar to s 20C are contained in ss 38S (transgender vilification), 49ZT (homosexual vilification) and 49ZXB (HIV/AIDS vilification).
- 38 The Act creates very few criminal offences, but s 20D(1) creates a criminal offence of serious racial vilification. It provides:
- "A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:
- (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.
- 39 While the physical harm identified in (a) and (b) could occur only to the bodies or property of living persons, I see no reason of language or policy why the "*group of persons*" identified in the chapeau of the provision should not include people who are dead. Criminal offences of serious vilification, in a form similar to s 20D, are created by s 38T (serious transgender vilification), s 49ZTA (serious homosexual vilification) and by s 49ZXC (serious HIV/AIDS vilification).
- 40 Thus, in the construction of these provisions concerning vilification the word "*person*" could mean a person who is dead. I doubt that there is any reason to believe that "*person*" has a different meaning in the sections relating to vilification to the meaning it has in other sections of the Act that make conduct unlawful. That suggests that in other provisions of the Act its meaning is not required to be narrowed to a person who is living.
- 41 Some other circumstances in which the Act uses "*person*" with the meaning that is not restricted to a living natural person appear below at [58]-[62], in the course of discussing the purpose of the Act.

"Relative" and "Associate"

- 42 I have said that the activities that make up the "Z" in the Common Form Prohibitions are all activities that can be engaged in only by living persons, and thus a Common Form Prohibition is breached only if the person aggrieved is a living person. However one of the ways in which there can be discrimination against the person aggrieved on the ground of Y is if the person aggrieved does not himself have the characteristic of being a particular Y, but the person aggrieved has a relative or associate who has the characteristic of being of a particular Y. That is the way in which QY and QZ submit that the Act has been breached in the present case: their contention is that they are living persons, who had services provided to them, and they were discriminated against in that provision of services because they had an associate with a disability.
- 43 In my view, in some circumstances it is possible for a "*relative*" of a person aggrieved to be a person who is dead, within the meaning of "*relative*" in s 4 of the Act (relevantly, "*any person to whom the person is related by blood*"). I see no difficulties as a matter of ordinary English in saying I am related by blood to my great-grandfather, notwithstanding that my great-grandfather is dead.
- 44 In *Re Dingjan* (1995) 183 CLR 323 at 362, Gaudron J observed, in the context of an argument relating to the use of the present tense in the statute conferring jurisdiction on the Australian Industrial Relations Commission:
- "The present tense may be used descriptively or it may be used to signify contemporaneity. Although there is no fixed rule, the use in a statute of the present tense, simpliciter, generally indicates that it is being used descriptively (the 'simple present'), whereas 'is' followed by a present participle (the 'continuous' or 'progressive' present) usually indicates contemporaneity. The descriptive use of the present tense can be seen in s 1278(4) where the words 'takes effect' do not indicate that an order then takes effect but, rather, describe and, thus, prescribe the way in which an order must take effect."
- 45 When the present tense is "*used descriptively*" it is sometimes referred to as the "*timeless present tense*". It is sometimes used to describe facts that are always the same, e.g. "*water freezes at 0C*", "*Paris is the capital of France*", "*Shakespeare is the author of Hamlet*". In the definition of "*relative*" one way of satisfying the definition is if one person is related to another by blood. The family relationships that people have to each other by a blood

connection are always the same, regardless of whether one person in the relationship has died. That is different to the way in which the family relationships that people have *with* each other, such as meeting and talking, are severed by death.

- 46 Another way in which one person can be a "*relative*" of another is by being related by marriage. However, being related by marriage does not have the same timeless connotation that being related by blood has. Divorce means that people who were once related by marriage are no longer related by marriage.
- 47 A person who is married is related by affinity to his or her in-laws. Just as divorce ends a relationship by marriage, so it ends a relationship by affinity.
- 48 Discriminating against a person, within the meaning of the definition such as s 7(1) is an action that takes place at a particular time. Consider a situation in which the aggrieved person has a relative or associate of a particular Y, on the ground of which the aggrieved person has been treated differently to someone who has a relative or associate of a different Y. In that situation, it is as at the time of the action that constitutes the discrimination that one must enquire whether it the person who has the particular Y is a relative or associate of the aggrieved person.
- 49 Because the definition of "relative" is an exhaustive definition, it can be applied in a provision like s 7(1)(a) by replacing the definiens with the definiendum: **Kelly v R** (2004) 218 CLR 216 at 253 per McHugh J; **San v Rumble (No 2)** [2007] NSWCA 259 at [43] per Campbell JA, Ipp JA agreeing and Beazley JA agreeing substantially; **Hastings Co-operative Ltd v Port Macquarie Hastings Council** [2009] NSWCA 400; (2009) 171 LGERA 152 at [16] per Basten JA, Allsop P agreeing. The definition is not one that operates by explanation rather than synonymous expansion: cf **Council of the Municipality of Randwick v Rutledge** (1959) 102 CLR 54 at 69; **San v Rumble (No 2)** at [52]. Substituting the definiens for the definiendum would result in the chapeau of s 7(1) relevantly ending with the words:

"... on the ground of ... the race of a person to whom the aggrieved person is related by blood, marriage, affinity or adoption, the perpetrator ..."

- 50 At the time of the action that constitutes the discrimination, the aggrieved person could have a person to whom he or she is related by blood, even though that person is dead. Thus that dead person could be a "*relative*" of the aggrieved person at the time in question. However, if the person in question was someone who was once the spouse of the aggrieved person, but they had divorced, and the spouse later died, the spouse would not be a "*relative*". Indeed, even if the divorced spouse remained alive, he or she would not be a "*relative*" of the aggrieved person at the time in question.
- 51 The definition of "*associate*" uses the present tense, but it is not the timeless present tense. When it talks of "*any person with whom the person associates*" it is talking about an activity of associating, which is being carried on at the time in question. A can be someone with whom B associates, at any particular time, even if they associate only intermittently, but it is still necessary that the relationship of being an associate has not come to an end through lapse of time or a rift in the friendship or death.
- 52 Similarly, when the definition of "*associate*" talks about "*any person who is wholly or mainly dependent on ... the person*" it is talking about a relationship of dependency that is in existence at the time in question. When that definition talks about "*any person who is ... a member of the household of the person*", is talking about being a member of the household at the time in question.
- 53 The prohibition that QY and QZ contend has been breached in the present case, s 49M, is a Common Form Prohibition. The definition in s 49B of what constitutes discrimination on grounds of disability follows the same form as the definition in s 7(1) of what counts discrimination on the ground of race.
- 54 In the present case, the time at which the alleged discrimination occurred is when B's body was returned to QY and QZ. By that time, B's death had had the consequence that he was no longer an "*associate*" of QY and QZ. For that reason, consideration of the words of the Act leads to the conclusion that there has been no discrimination on the ground of disability.

Purpose of the Act

- 55 The purpose of the Act should be taken into account before a final decision is made about its correct construction. One aid to ascertaining the purpose of the Act is its long title:

"An Act to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons."

- 56 I agree that an important objective of the Act is to protect living persons against discrimination. The discrimination that they are protected against might be on the ground of a characteristic that they have, or on the ground of a characteristic that a relative or associate has.

57 There is no reason readily apparent from a reading of the Act why discrimination on the basis of a characteristic of someone who was once a relative or associate, but is no longer a relative or associate at the time of the differential conduct, is not also prohibited. However, that consequence flows from the language of the Act. It may be that Parliament took the view that certain circumstances were unlikely, or occurred too infrequently to warrant legislating against. These circumstances might include:

(1) discrimination on the basis of a characteristic that a deceased associate had;

(2) discrimination on the basis of a characteristic that any other person who was once an associate but is no longer an associate had; and

(3) discrimination on the basis of a characteristic that a former spouse or relation by affinity had.

However it cannot be said that there is any basis in the text of the Act for concluding that that was so.

58 Protecting living persons against discrimination is not the sole object of the Act. As well, the terms of the Act shows that it has an objective of affecting societal standards by discouraging discrimination and promoting equality. One way in which it does this is by attaching sanctions to discriminatory conduct on the basis of a particular characteristic. This creates an incentive not to engage in such behaviour, which has a tendency to protect all persons with the particular characteristic (whether now alive or not) from future discriminatory behaviour. The orders that the Tribunal is empowered to make under s 108 if it finds that a complaint has been substantiated are quite varied - see [37] above - and are not limited to remedying any injustice that an individual complainant might have suffered by reason of the discrimination. As well, s 119(1) as at November 2007 provided:

"For the purpose of eliminating discrimination and promoting equality and equal treatment of all human beings, the Board may, by resolution, determine to:

(a) carry out investigations, research and inquiries relating to discrimination and in particular discrimination against a person or persons on the ground of:"

There then follows a lengthy list of characteristics that people might have. Section 119(1) as at November 2007 also empowered the Board to:

"(b) acquire and disseminate knowledge on all matters relating to the elimination of discrimination and the achievement of equal rights,

(c) arrange and co-ordinate consultations, discussions, seminars and conferences,

(d) review, from time to time, the laws of the State,

(e) consult with governmental, business, industrial and community groups and organisations in order to ascertain means of improving services and conditions affecting minority groups and other groups which are the subject of discrimination and inequality,

(f) hold public inquiries,

(g) develop human rights programmes and policies, and

..."

59 Section 119(2) provided:

"The Board may, for the purposes of the exercise of any of its functions under this section, enter into an agreement with any person that provides for payment to the Board for any services or materials it supplies."

60 There is no reason why "*person*" in s 119(2) should not extend to a corporation (necessarily not alive) that pays the Board for services or materials. The objectives of the Act would be furthered by reading "*person*" in that way.

61 Section 120A(1) conferred on the Board power to develop and promote codes of practice. Section 120A continued:

"(2) The Board may consult with a representative body and persons operating in an industry or other area of conduct to which this Act applies for the purpose of developing a code of practice.

(3) A code of practice is to provide guidance to persons in a specified area of conduct as to:

(a) the kinds of activity that may involve or constitute a contravention of this Act, and

(b) means of limiting, avoiding or restricting the width of any such activity or contravention, and

(c) any other matter that the Board considers necessary or convenient in the exercise of its functions under section 119.

(4) A code of practice is not legally binding on any person, but evidence of compliance with or contravention of a code may be considered by the President and the Tribunal in the exercise of functions under this Act or the Administrative Decisions Tribunal Act 1997."

62 The "*persons*" referred to in these subsections might well be corporations, and the objectives of the Act would be furthered by reading the subsections in that way.

63 The dual purposes of the Act that are identified in its short title, and exemplified in the provisions to which I have referred, do not provide any reasons for doubting the construction of the Act which I have arrived. The objective of changing societal standards would support "*person*" in these provisions relating to the Board extending to a non-living entity. That provides some confirmation that "*person*" has a meaning in the Act that extends beyond living natural persons. It has that meaning even though the scope of application of very many (but not all) of the provisions of the Act containing the word "*person*" is such that the provision, by reason of words in it other than "*person*", in fact applies only concerning living persons.

The Second Reading Speeches

64 In *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252, French CJ, Gummow, Hayne, Crennan and Kiefel JJ commented at [33] that "*it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.*" Thus it is only at this stage of the judgment that I turn to consider the relevant second reading speeches.

65 Section 34(1) *Interpretation Act 1987* provides:

"In the interpretation of a provision of an Act... , if any material not forming part of the Act ... is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act ... and the purpose or object underlying the Act ...), or

(b) to determine the meaning of the provision:

(i) if the provision is ambiguous or obscure, or

(ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act ... and the purpose or object underlying the Act ...) leads to a result that is manifestly absurd or is unreasonable."

66 I do so bearing in mind that a Minister's statement of intention, or a statement of a Minister's understanding of how a provision will operate in practice is sometimes not "*capable of assisting in the ascertainment of the meaning of the provision*" : *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380 at 384-5 [12]-[16] per Spigelman CJ and at 400-1 [168]-[172] per Mason P; *Preston v Commissioner of Fair Trading* [2011] NSWCA 40 at [174]. I also do so bearing in mind that substituting the words of the Minister "*for the text of the law*" is not permissible: *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ.

67 The second reading speech of the Act (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 23 November 1976, at 3337 contains a statement by Premier Wran: "*This bill is an attempt, so far as legislation can, to end intolerance, prejudice and discrimination in our community.*" That provides some confirmation of the broad objectives that emerge from the text of the Act.

68 The *Anti-Discrimination (Amendment) Act 1994* extended the coverage of the Act to people who experienced discrimination because of their relationship or association with another person who has a characteristic on the basis of which the Act recognises that discrimination can occur. Mr Hartcher, the Minister for the Environment, gave the second reading speech: New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 12 May 1994 at 2464. After noting that definitions of "*associate*" and "*relative*" were being inserted into s 4 of the Act, the Minister continued at 2467:

"The purpose of the new definitions is to extend the coverage of the *Anti-Discrimination Act* to people who experienced discrimination because of their relationship or association with another person who is a member of a group protected by one of the existing grounds of the Act. The new definitions will allow a relative or associate of a person of any particular race, sex or marital status, or relatives or associates of persons with disability or of persons who are homosexual, to also have the standing to lodge a complaint. This is an important extension as the Anti-Discrimination Board has, for example, received complaints from individuals who are associated with or accompanying people of particular races and who are discriminated against in the provision of education, goods and services, and accommodation."

69 The final sentence of this statement is the only part that provides an explanation rather than a precis of the text of the Act. It is consistent with the view that the 1994 amendments were intended to be limited to rectifying discrimination suffered by associates because of their association with living persons. I do not view the passage as supporting the view that the 1994 amendments were intended to convey a broader right to claim discrimination which occurred even after their associate had died. The Minister employed the phrase: "*individuals who are associated with or accompanying people ...*". That indicates the importance of an ongoing and immediate connection. If this factor were important, it would exclude deceased persons from the scope of the term "*person*" in the definition of "*associate*".

70 The Respondents point to the Minister's statement in the second reading speech concerning the new s 49A: "*This*

amendment will protect persons who are discriminated against on the basis of their family medical history, for example". The prime way in which a person might be discriminated against because of their family medical history is if they are perceived as being at risk of developing some medical problem of genetic origin because one or more of their relatives has exhibited that medical problem. Because of the provisions of s 49A(d) (set out at [103] of the judgment of Young JA), a person who will have a disability in the future, and a person concerning whom it is thought that he or she will in the future have a disability, is treated as having, now, a disability.

- 71 There is some variation amongst the various provisions of Part 4A that contain a Standard Form Prohibition. However, most contain an exception to the prohibition that, broadly, applies if the person in question because of his or her disability would be unable to carry out the inherent requirements of the activity in question. Most also contain an exception that applies if the person would require extra services or facilities to enable them to do so and the provision of which would impose an unjustifiable hardship on the person to whom the Standard Form Prohibition is directed. Section 49Q contains a special exception concerning discrimination against a person on the ground of disability concerning the terms on which various types of superannuation or insurance can be obtained. The exemption operates if, broadly, those terms and conditions are based on sound actuarial or statistical data, or are otherwise reasonable. These exceptions show Parliament striking a balance between the undesirability of a person being discriminated against in certain activities because of their genetic risk, and a recognition that there are some circumstances in which discrimination on the basis of genetic risk is justifiable. The fact that the Minister made special mention of discrimination based on family medical history provides some support, in my view, for the construction I have given of "*relative*" as extending to a deceased blood relation of the person in question.
- 72 The second reading speeches provided no reason for doubting, and a small measure of confirmation for, the construction of the Act that I have arrived at on the basis of its wording.
- 73 As the discussion so far is sufficient to dispose of the appeal, is unnecessary to state dicta concerning other topics that were discussed in the course of the appeal.
- 74 I agree with the orders proposed by Young JA.
- 75 **MACFARLAN JA** : Subject to the qualification in [77] below, I agree with the judgment of Young JA. I add the following comment.
- 76 It is only with some hesitation that I have come to agree with his Honour's view that s 49B does not extend to discrimination in connection with disabilities of persons who have been in the past, but are not at the time of the discrimination, relatives or associates of the aggrieved person. I have concluded that the present tense used in the section and in the definition of "associate" in s 4 requires that conclusion. In particular the words "who does not have such a relative or associate" in s 49B(1)(a) in my view clearly speak of a present connection. Whilst it is difficult to understand why that connection should be required, that is insufficient reason to disregard the unambiguous literal meaning of the text. I agree also with Campbell JA's more detailed exposition of why this conclusion is correct.
- 77 As this conclusion is sufficient to dispose of the proceedings on appeal, I do not consider it appropriate to express a view on the second issue dealt with by Young JA, namely whether a deceased person can be a "person" under the Act. For the reasons that Campbell JA gives, this is an issue of some complexity, which may be resolved in different ways depending upon the context in which it arises.
- 78 **YOUNG JA** : This is the concurrent hearing of an application for leave to appeal and, if leave is granted, the hearing of the appeal from a decision of the Appeal Panel of the Administrative Decisions Tribunal ("ADT").
- 79 The Appeal Panel heard and allowed an appeal from the Equal Opportunity Division of the ADT before Magistrate Hennessy.
- 80 The facts were well set out in the Appeal Panel's judgment from which the following is taken.
- 81 The persons described as Ms QY and Mr QZ, claimed to be aggrieved persons (within the meaning of s 49B of the *Anti-Discrimination Act 1977*) ("the Act") because they claimed to be "associates" of a Mr B who died on 18 November 2007, apparently by suicide.
- 82 Before the ADT, QY and QZ claimed to be associates (as defined in s 4 of the Act) of B during B's lifetime. Ms QY is a long-term friend of B; Mr QZ was his homosexual life partner.
- 83 B was HIV positive at the time of his death. As a suspicious death, the Coroner took control of the body. The Coroner directed a full post-mortem which was conducted by the Department of Forensic Medicine ("DOFM"). The DOFM did not reconstruct the body before return to the next-of-kin, in line with an internal occupational health and safety policy that did not allow reconstruction in the case of bodies with certain conditions, one of them being HIV positive status.

- 84 The DOFM released the body to a private undertaker. The undertaker was not prevented by law from proceeding to reconstruct. According to the complainants, the undertaker advised them that, due to the state in which the body was received, the undertaker was not practically able to reconstruct it. The respondents say that, as a consequence, they were forced to reveal to members of the family of the deceased who were previously unaware of his condition, the reason for Mr B's death and why the body had not been reconstructed.
- 85 QY and QZ complain of discrimination by the coronial services managed by the DOFM. They say that they suffered unlawful discrimination because of the condition in which the body of their deceased associate was returned to them after forensic pathology. They claim that they were treated differently, as compared to next of kin whose relatives die free of disability.
- 86 The appellant's basic position on the merits of the case is that it dealt with the body in accordance with official policy, and it was proper to do so. The appellant's case on the legal issues is that, as the law stood in November 2007, a person did not have associates (as defined in the Act) after death and there cannot be actionable discrimination after the death of the person suffering from a disability.
- 87 The DOFM is managed, administered and funded by the appellant. However, its role is to assist Coroners and other courts. The Glebe office of the DOFM which is involved in the present case is attached to the Coroner's Court.
- 88 Magistrate Hennessy summarily dismissed the application pursuant to s 102 of the Act because her Honour held that a jurisdictional fact was missing, namely a living person with a disability to whom the respondents could be associates.
- 89 Essentially there was a finding that a dead person was not a "person" within ss 4 and 49B of the Act.
- 90 The appellant also relied on a second ground, namely that, if there was discrimination, it was not in respect of the provision of services within the meaning of s 49M of the Act. Her Honour did not rule on this submission.
- 91 The Appeal Panel reversed the magistrate's decision and remitted the case for trial. Essentially it did so because it considered that "person" included a deceased person.
- 92 The appellant seeks leave to appeal. Leave is necessary because the decision below was an interlocutory one. If leave is granted the appeal is considered under s 120 of the *Administrative Decisions Tribunal Act 1997*, which confers broad powers of review on this Court.
- 93 The concurrent hearing took place on 20 May 2011. Dr M A Perry QC and Ms L Clegg appeared for the appellant and Dr C S Ward and Mr S J Walsh appeared for the respondents.
- 94 However, it appeared that further consideration was required of key aspects of the appeal. The upshot was that we adjourned the hearing of the appeal. Further directions were given in open court on 17 June, which included the formulation of a final version of the draft notice of appeal and allowed for further submissions to proceed in writing.
- 95 The appellant's further submissions were dated 5 July 2011. The respondents' were dated 26 July and the appellant's submissions in reply 29 July. The final draft notice of appeal bears date 21 June 2011. The Court then reserved its decision.
- 96 The grounds in the final draft notice of appeal may be summarised as follows:
- 1 and 1A. The existence of a live person at the time of the alleged discrimination is a jurisdictional fact and the Appeal Panel was in error in not so finding.
- 1B. The Appeal Panel erred in failing to find that QY and QZ were neither relatives nor associates of B.
- 2 and 3. The Appeal Panel erred in that it failed to uphold the summary dismissal on the basis that s 48 of the *Coroners Act 1980* was a complete answer to the complaint.
4. The Appeal Panel should have held that the appellant did not provide a service within ss 4 and 49M of the Act.
- 97 The respondents protested about the grounds being broadened. They also protested that the appellant had abandoned ground 4 and then, after comments from the Bench, sought to reinstate it.
- 98 There is some validity in the respondents' protest. However, as will appear, the decision of the appeal is not affected by the additional grounds and it is as well for the court to deal comprehensively with the interlocking problems that arise in this area of the law.
- 99 Before proceeding further, I must set out the provisions of the Act as they existed at the relevant time.
- 100 The definition section, s 4, contained the following definitions of "associate" and "relative":

"associate of a person means:

- (a) any person with whom the person associates, whether socially or in business or commerce, or otherwise, and
- (b) any person who is wholly or mainly dependent on, or a member of the household of, the person.

relative of a person means any person to whom the person is related by blood, marriage, affinity or adoption."

101 Section 4 also carried a definition of "disability" viz:

"disability" means:

- (a) total or partial loss of a person's bodily or mental functions or of a part of a person's body, or
- (b) the presence in a person's body of organisms causing or capable of causing disease or illness, or
- (c) the malfunction, malformation or disfigurement of a part of a person's body, or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (e) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions, or judgment or that results in disturbed behaviour."

102 It should be noted that the definition of relative was amended after the events with which we are concerned by adding at the end " , or the de facto partner of the person". We can thus say no more about "relative" as neither QY nor QZ was within the definition of "relative" as it existed at the relevant time.

103 Sections 49A, 49B and 49M should be set out in full:

49A Disability includes past, future and presumed disability

A reference in this Part to a person's disability is a reference to a disability:

- (a) that a person has, or
- (b) that a person is thought to have (whether or not the person in fact has the disability), or
- (c) that a person had in the past, or is thought to have had in the past (whether or not the person in fact had the disability), or
- (d) that a person will have in the future, or that it is thought a person will have in the future (whether or not the person in fact will have the disability).

49B What constitutes discrimination on the ground of disability

(1) A person (*the perpetrator*) discriminates against another person (*the aggrieved person*) on the ground of disability if, on the ground of the aggrieved person's disability or the disability of a relative or associate of the aggrieved person, the perpetrator:

- (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have that disability or who does not have such a relative or associate who has that disability, or
- (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have that disability, or who do not have such a relative or associate who has that disability, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

(2) For the purposes of subsection (1)(a), something is done on the ground of a person's disability if it is done on the ground of the person's disability, a characteristic that appertains generally to persons who have that disability or a characteristic that is generally imputed to persons who have that disability.

(3) For the purposes of, but without limiting, this section, the fact that a person who has a disability of or relating to vision, hearing or mobility has, or may be accompanied by, a dog which assists the person in respect of that disability, is taken to be a characteristic that appertains generally to persons who have that disability, but nothing in this Act affects the liability of any such person for any injury, loss or damage caused by the dog.

(3A) For the purposes of, but without limiting, this section, the fact that a person who has a disability:

- (a) is accompanied by, or possesses, a palliative or therapeutic device, or other mechanical equipment, that provides assistance to the person to alleviate the effect of the disability, or
- (b) is accompanied by an interpreter, a reader, an assistant, or a carer, who provides interpretive, reading or other services to the person because of the disability, or because of any matter related to that fact,

is taken to be a characteristic that appertains generally to persons who have that disability.

(4) A reference in this section to persons who have a disability ("the particular disability") is a reference to persons who have the particular disability or who have a disability that is substantially the same as the particular disability.

49M Provision of goods and services

(1) It is unlawful for a person who provides, for payment or not, goods or services to discriminate against a person on the ground of disability:

(a) by refusing to provide the person with those goods or services, or

(b) in the terms on which he or she provides the person with those goods or services.

(2) Nothing in this section renders it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services would impose unjustifiable hardship on the person who provides the goods or services.

104 We must also not lose sight of s 49P of the Act, which is as follows:

49P Public Health

Nothing in this Part renders unlawful discrimination against a person on the ground of disability if the disability concerned is an infectious disease and the discrimination is reasonably necessary to protect public health.

105 I also need to refer to certain provisions of the *Coroners Act* 1980. That Act was repealed in 2009, but it was the 1980 Act that applied at the relevant time. However, I will note in brackets the corresponding section number in the 2009 Act.

106 Section 24(56) gives the coroner the right to possession of a body for the purpose of holding an inquest. Section 48 (89) gives the coroner the right to have a doctor perform a post mortem on a body. Section 53AA (88 is an expanded version) provides that, in the performance of a post mortem examination, regard is to be had to the dignity of the deceased. Section 53B (101) provides for the coroner authorising the disposal of human remains.

107 Section 52A (94 is an expanded and slightly different provision) should be set out in full:

Nothing done by a medical practitioner or other person in good faith for the purposes of making a post mortem examination, or a special examination or test, pursuant to a direction under this Act subjects the person personally to any action, liability, claim or demand.

108 I am of the view that I can most efficiently consider the result of the application and appeal if I deal with the submissions in the following order:

1. Should leave to appeal be granted?

2. Does "person" in the definitions section and s 49B of the Act include a deceased person?

3. Was any alleged discrimination after B's death because of a "disability"?

4. Was either or both QY and QZ a relative or associate of B at the time of the alleged discrimination?

5. Does a doctor performing a post mortem under direction from a coroner perform a "service" within the meaning of s 49M of the Act?

6. Does the *Coroners Act* protect a doctor conducting a post mortem under direction from a coroner who is protected against liability under the Act?

7(a) Is the DOFM under an obligation to reconstruct all bodies after a post mortem?

(b) Does the policy of the DOFM not to reconstruct the body of a deceased person who was HIV positive constitute discrimination against the associates of the deceased?

8. The result of the application and appeal.

1. Should leave to appeal be granted?

109 In my view this can be simply answered. The decision below is questionable and the points to be decided are matters of public importance. Leave to appeal should thus be granted on the basis that the draft final Notice of Appeal is filed within seven days of the publication of these reasons.

2. Is a deceased person a "person" under the Act?

110 In its written submissions, the appellant notes that the general approach to anti-discrimination legislation is to confine its operation to discrimination against a person who was living at the time of the act; see eg *CUNA Mutual Group Ltd v Bryant* [2000] FCA 970; 102 FCR 270. However, the authorities also show that, provided the discriminatory act takes place whilst the "victim" is alive, the statutory action to vindicate the victim may continue after his or her death; see eg *Stephenson v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 290; *Harris v Lewisham and Guy's Mental Health NHS Trust* [2000] EWCA 52; 3 All ER 769.

111 The appellant puts that the history and the words used in the relevant sections of the Act point to the construction that "person" means living person.

112 Dr Ward, on the other hand, says that there are three possible scenarios viz:

- (a) Where a person is discriminated against in his or her lifetime and takes proceedings before death;
- (b) Where the person is so discriminated against but does not sue before death;
- (c) Where the person is discriminated against after death.
- 113 In cases (a) and (b) the action continues: *Commonwealth of Australia v Wood* [2006] FCA 60; 148 FCR 276; why, he asks, rhetorically, does it not do so in (c)?
- 114 The answer is of course, that the terms of the Act show that it does not.
- 115 It was interesting to note that Dr Ward eschewed any notion of an action under the Act passing to the deceased person's executor. He did so as he put that the survival of the action depended on the Act and that, on its true construction, only the relative or associate had the action available. This submission confirms that the answer to the problems in this case is to be found in the true construction of the Act.
- 116 The meaning of the word "person" in the Act must be gleaned from the context: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27, 31 at [4].
- 117 The whole context of the Act points to a person being a living person who may suffer from the discrimination. The exception is discrimination suffered by associates and relatives, but in that connection, the legislature merely extended protection in a limited way by an overlay on the existing provisions.
- 118 The history of the Act shows a development gradually covering more and more cases.
- 119 Part 4A of the Act, which includes ss 49A and 49B was added by Act 15 of 1981 (as Part IVA). Act 15/1981 added a definition in s 4 of "handicapped person" as a person who, as a result of a physical impairment, "is limited in his opportunities to enjoy a full and active life." At that stage Part 4A applied only to handicapped persons.
- 120 Part 4B (IVB) was added by Act 142 of 1982 to cover persons with intellectual disabilities. That disability was defined in terms of a person who *is* limited in one or more major life activities.
- 121 Part 4A was substituted in 1994 to cover a much wider range of perceived disabilities. In his second reading speech, the Minister for the Environment described the 1994 Act as the first significant overhaul of the Act.
- 122 I very much doubt whether the Minister had the present problem in mind when he made that speech. Be that as it may, the bulk of it seems to deal with living persons. However, the respondents point out that it does include the sentence, "This amendment will protect persons who are discriminated against on the basis of their family medical history."
- 123 When one looks at the specific heads of discrimination, with the possible exception of discrimination in providing services, all the matters of direct discrimination refer to matters which are only relevant to a living person, eg the provision of accommodation, the provision of work or discrimination in the workplace, matters of compulsory retirement, insurance, safety, student rights, etc.
- 124 Another matter which supports the view that the propositus must be a living person is the constant use of the present tense to describe what might constitute discrimination. The significance of this must not be overlooked, *Re Dingjan; Ex Parte Wagner* [1995] HCA 16; 183 CLR 323, 362.
- 125 In my view, Magistrate Hennessy approached the problem in the correct manner and reached the correct result. Her Honour looked at dictionary definitions of "person" and found the prime meaning was a natural person or individual. She then noted that the prime thrust of the Act was to protect living persons against discrimination. She noted that Branson J in the *CUNA* case said at [49] that, in light of the background to the legislation, she would have expected the legislature, if it had intended to extend protection in respect of a deceased person, to have clearly said so. Applying this dictum, the learned magistrate did not consider that the extension to relatives and associates carried with it the right to sue with respect to post mortem discrimination.
- 126 I do not find in the Appeal Panel's reasoning any refutation of this approach. Their alternative approach to take a broad brush approach to the problem and say that the Act is remedial legislation and must be given a wide meaning (Patten DP) and the word "person" in ordinary speech may include a deceased person (O'Connor DCJ (P)), does not provide escape routes from the task of construing the relevant legislation before the court.
- 127 I might add that this approach is consistent with the approach taken with other statutes where similar problems have occurred; see eg *AW v CW* [2002] NSWSC 301; 54 NSWLR 445, a decision on the *Status of Children Act* 1996 s 26 .
- 128 Accordingly, I consider that the answer to the question posed should be answered, "No" and the appeal should be upheld on this ground alone.

3. Was any alleged discrimination after B's death, because of a "disability"?

- 129 In her oral submissions, Dr Perry put that "a disability is one that can only inhere in a person while they are alive. The reason for the allegedly differential treatment by the applicant is the presence within the body, once deceased, of a virus. So it was not discrimination on the basis of an attribute, being a disability, that inhered in the deceased while the deceased was alive."
- 130 This was a bit of surprise in the light of the grounds of appeal and the appellant's written submissions.
- 131 The transcript records Campbell JA's initial reaction, "Can we identify where that argument gets a hold on the language of the statute. One place may be in the definition of 'disability'... Is your point that a dead person is not a person within the meaning in the legislation?"
- 132 Dr Perry made it clear that what Campbell JA had put was her secondary argument, thus showing that her principal argument was something other than the matter argued before the ADT and noted in the grounds of appeal.
- 133 Dr Perry replied that hers was a narrower point namely "whether the presence of a virus within the body of a deceased person could constitute disability for the purposes of s 49M, the provision allegedly breached in the complaint, and defined in s 49A and s 4(1)."
- 134 Counsel pointed out that paragraph (b) of the definition of disability involves organisms which are causing or capable of causing disease or illness and that as a dead body cannot suffer disease or illness, the presence of organisms in a dead body is not a disability.
- 135 As there was no evidence as to how long the HIV virus lives after the death of its host, the submission needs to be adjusted to one where the disability was one which was thought to exist by the discriminator (vide s 49A(b)).
- 136 During oral submissions, two of the judges expressed the view that this argument was merely putting what should be the principal concern, namely the matter dealt with under heading 2 in a much more difficult and complicated manner and one which would involve consideration of the ambit of s 49P. I continue to adhere to that view. However, the present argument really leads to the same result, so no harm is done.
- 137 Dr Ward also focussed his argument on "disability". He put that what the Act aims at is discrimination because of a disability that a person has or has ever had. In the present case, Mr B had a disability whilst he was alive and continued to have a disability the day after he died because he was a person who once had a disability.
- 138 Furthermore, a person can only have a total loss of bodily functions within (a) of the definition of disability once he or she is dead.
- 139 This way of approaching the construction of the statute focuses on peripheral matters rather than the key question namely what is meant by "person" and in so doing merely throws up some problems with the definition of disability on the operation of the Act as a whole.
- 140 I was not assisted by Dr Ward's analysis.

4. Are QY and QZ relatives or associates?

- 141 I have already pointed out why the respondents cannot be relatives as defined by the Act as it was in force in November 2007.
- 142 As to associates, it is true that one reading of s 49B would permit an associate (XYZ) to say, "My associate ABC was a person with a particular disability and I am the subject of discrimination because of my association with him". O'Connor DCJ took the view in the Appeal Panel that it would be absurd in such a situation to say that XYZ could only complain if ABC were still alive. The answer is, of course, that the wording of the definition of "associate" means that the problem does not arise.
- 143 Friendships do not necessarily last forever. Some are terminated by rifts, some by long absences, others by death. The definition of "associate" uses the present tense and, in my view, means that a person is only an associate so long as the relationship continues.
- 144 It may be that there is a certain illogicality in confining s 49B to association with living persons. However, the pattern of growth of the Act is that the legislature by degrees amends the Act to deal with more and more situations and, as at 2007, it had only progressed this far.
- 145 The definition of "associate" focuses on any person with whom the person associates. As Mr B was not a person at the time of the alleged discrimination and as a deceased person at that time does not have people with whom he

associates at that time, it must follow that neither QY nor QZ are associates who can complain of discrimination.

5. Does a doctor performing a post mortem under direction from a coroner perform a "service" within the meaning of s 49M of the Act?

- 146 The term "services" is defined in s 4 of the Act. The definition "includes" six specified matters. These matters are, in summary, the provision of finance facilities, transport, entertainment, professional or trade services and access to public facilities. Paragraph (e) of the definition is "services provided by a council or public authority".
- 147 A similar provision to (e) was the subject of consideration by the Federal Court in *Rainsford v Victoria*. A preliminary point was considered by a Full Court [2005] FCAFC 163; 144 FCR 279 ("Rainsford 2005"), the trial itself by Sundberg J [2007] FCA 1059; 167 FCR 1 and on appeal [2008] FCAFC 31; 167 FCR 26. That case concerned a prisoner who complained that his bed in his cell was too low for him to make without hurting his injured back and that his bad back was not taken into account when he was transported from prison to prison.
- 148 In *Rainsford 2005*, Kenny J with whom Hill and Finn JJ agreed said at p 296 [54] that, in accordance with what the High Court had said in *IW v City of Perth* [1997] HCA 30; 191 CLR 1, the word "services" should be given a wide meaning, but as the High Court had held in *Waters v Public Transport Corporation* [1991] HCA 49; 173 CLR 349, whether a particular matter fell within the legislation was a question of fact.
- 149 Sundberg J seemed to accept that some acts of a prison authority might come within the term "services" but that accommodation and inter prison transport for prisoners did not as a matter of fact. The Full Court dismissed the appeal, said that it was unnecessary to consider the term services, but hinted that the provision of transport within the prison system might amount to a service.
- 150 The appellant's submissions note that there are authorities which hold that a public authority selecting foster carers provides services (*Director-General DOCS v MM & AM* [2003] NSWSC 1241; (2007) EOC 93-464 [42]-[44] per Barr J), a police officer provides services to a prisoner to protect him from injury or death (*Commissioner of Police v Russell* [2001] NSWSC 745 per Sully J) and to victims of crime when investigating and detecting crime (*Farah v Commissioner of Police* [1998] QB 65, 83 per Otton LJ and *Commissioner of Police v Mohamed* [2009] NSWCA 432). The assessment of taxes and giving advice to taxpayers by a public authority has also been held to come within the term, though not the collection of taxes (*Savjani v Inland Revenue Commissioners* [1981] QB 458).
- 151 As the question is one of fact and the learned magistrate did not make a finding on the point, were it not for one matter, we could not decide the point.
- 152 The matter to which I refer is that s 49M does not just deal with provision of services. It focuses on the provision of services to a person. As Mr B was not a person at the time the alleged services were provided, if what the DOFM did was to provide services, they were not provided to a person.

6. Does the Coroners Act protect a doctor conducting a post mortem under direction from a coroner protected against liability under the Act?

- 153 Evidence was given at first instance by the general manager of the DOFM which was mainly not disputed. This evidence included the following statement in his affidavit of 10 December 2009:
- "11. The aim of the post mortem examination is to discover, describe and record the pathological processes present in the deceased. These processes are then related to the known medical history to make conclusions about the causes of symptoms and signs observed in life and then to make conclusions about the medical cause of death and factors contributing to death."
- 154 The post mortem examination may involve the pathologist making incisions in the remains. Reconstruction of a body is part of the post mortem process. The restoration process involves repairing the incisions made during the examination. Any wound to the body not made during the post mortem, such as wounds on the body when it was discovered, are not part of the restoration process, but may be attended to by the funeral director if the family so wishes.
- 155 The general manager gave the opinion that the DOFM regards reconstructions as an act of goodwill for the relatives done for reasons of compassion.
- 156 The general manager stated that "there is no services (or other) contract between the DOFM and the Coroner or the Office of State Coroner." He says that the performance of a post mortem examination comes about by the operation of statutory obligations in the *Coroners Act*. Apart from cases under s 29 of the *Human Tissue Act* 1983, the DOFM's post mortem activities are virtually all at the direction of a coroner. Of course, it is not disputed that the present post mortem was because of such a direction.
- 157 Just on the plain reading of s 52A of the *Coroners Act*, one would think that the medical practitioners who were

involved in the post mortem would be exempt from any civil liability.

- 158 The respondents say that the section could not apply to the consequences of discrimination under s 49B of the Act.
- 159 I cannot see any reason for taking this view. Section 52A endeavours to cover the field and, just as a claim by a disabled person survives death as an "action", so a claim against a medical practitioner must also be regarded as an "action".
- 160 The situation would thus appear to be that the medical practitioner in a post mortem examination may commit an act of discrimination against a person, but, if that discrimination occurs, the medical practitioner will not be liable for the consequences.
- 161 It would seem, based on the American authorities cited in Jackson, *The Law of Cadavers* (Prentice Hall Inc, New York, 1936) p 165 that even at common law, a medical person performing a post mortem to establish cause of death is not liable to the next of kin.
- 162 Again, there is a lot to be said for the proposition that a post mortem examination under the aegis of a coroner is part of a judicial process and there is protection under s 44B of the *Judicial Officers Act 1986*.
- 163 If the medical practitioner is not liable, the appellant could not be vicariously liable for his or her acts.
- 164 I should note here that the appellant presented submissions based on the decision of this court in *Commonwealth of Australia v Griffiths* [2007] NSWCA 370; 70 NSWLR 268 that the medical practitioner would have witness immunity. In the light of the respondents' concession that they do not claim that the medical practitioner has any liability and in the light of the difficulties caused by the English Supreme Court in *Jones v Kaney* [2011] UKSC 13; 2 WLR 823, it is best merely to note this submission and pass on.
- 165 The respondents say that they have no complaint against the medical practitioner, nor do they claim that the appellant is vicariously liable for his or her acts. The claim is that the appellant was guilty of discrimination in not providing services to the associates (ie reconstructing the body) as it would have done for a person without B's disability. Thus, it is submitted, the policy of the DOFM is attacked as being discriminatory.
- 166 There is a difficulty here as the Act focuses on conduct which actually is discriminatory rather than general policies which, if implemented, could be discriminatory. However, I will deal with this submission under head 7.

7(a) Is the DOFM under an obligation to reconstruct all bodies after a post mortem?

(b) Does the policy of the DOFM not to reconstruct the body of a deceased person who was HIV positive constitute discrimination against the associates of the deceased?

- 167 (a) This is not really a live question as the DOFM itself regards it as appropriate and its regular practice to reconstruct the body before releasing it. It may be that this is a general law duty in any event
- 168 It does not seem to me to matter at all whether, as the DOFM regards it, this act is a voluntary act of compassion, or it is required by s 53AA or, the general law position in the USA, as stated in Jackson, *The Law of Cadavers* in subsequent paragraphs, applies in NSW.
- 169 (b) The evidence shows that the policy of the DOFM with respect to persons who die of HIV/AIDS is that the autopsy takes place under special conditions in the Infectious PM Room. Paragraph 8 of the procedural manual reads as follows:
- "Hepatitis C or HIV positive bodies are not to be reconstructed after autopsy. All family members are informed and asked to view the body before autopsy. After completion of the autopsy, the body is double bagged, the outer bag yellow and to be clearly labelled with 'not reconstructed', then placed in the body storage area."
- 170 No statutory authority was given us to justify this part of the policy.
- 171 Further, it seems to be in conflict with both s 53A of the *Coroners Act* and the American authorities referred to in Jackson.
- 172 Jackson at p 164 cites a number of American cases dealing with the requirement post autopsy to deliver the body for burial in a fit state. Perhaps the most colourful statement is from the judgment of the Appellate Division of the New York Supreme Court (1st Department) in *Foley v Phelps* 37 NYS 471, 474 (1896):
- "The right is to possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger ... may choose to turn over to an afflicted relative."
- 173 To the same effect is the decision of the Appellate Court of Illinois, First District in *Palenzke v Bruning* 98 Ill App 644

(1900) and the Court of Appeals of Georgia in *Rushing v Medical College of Georgia* 62 SE 563 (1908).

174 However, for a number of reasons, I do not consider it appropriate to decide whether the American rule applies in NSW. First, it would seem that the general rule may give way to Public Health legislation and we have not been taken into that area. Secondly, Jackson hints that, where the death is of a person with a contagious disease, different principles might apply. Thirdly, we are not told who Mr B's executor who would have the right to receive the body in a proper condition, is and the point should not be decided without that person's input if he or she desired to give it. Fourthly, the decision on the point cannot affect the result as the respondents are not associates.

8 The result of the application and appeal

175 It follows from what has been said above that the application for leave to appeal should be granted and the appeal allowed.

176 The Court confirms the order of Magistrate Hennessy, summarily dismissing the respondents' claims.

177 As to costs, as the appellant succeeded, it should receive its costs of the appeal. Costs are not awarded in the ADT.

178 Accordingly, I would propose the following orders:

(1) Leave to appeal granted.

(2) Appellant to file notice of appeal in the form of the final draft of 21 June 2011 within seven days.

(3) Appeal allowed.

(4) Order that the claim of the respondents be summarily dismissed.

(5) Order that the respondents pay the appellant's costs of the appeal.

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