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## Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (One Minute Read)

**Joudo v Joudo** (NSWCA) - Court of Appeal upheld the finding of a joint endeavour constructive trust where the respondents had contributed to the upkeep of a property and the appellant now sought to retain the benefit of those contributions, contrary to the arrangement between the parties (I B C)

**Blue Mirror Pty Ltd v Tan & Tan Australia Pty Ltd (in liq)** (NSWCA) - trial judge had erred in regarding a plaintiff's failure to file a reply to be significant, and in effectively imposing an onus on a plaintiff to take forensic steps to obtain evidence to defeat a positive defence (I B)

**M1 v R1** (NSWCA) - extension of time refused to seek judicial review of primary judge's decision to summarily dismiss defamation proceedings and to make a gross sum costs order (I)

**Marahra Holdings Pty Limited v Insurance Australia Limited** (NSWSC) - landlord suing tenant's public liability insurer after a fire was permitted to withdraw pleadings of particular facts and substitute a plea of *res ipsa loquitur*, even though the insurer had pleaded reliance on those pleaded facts to trigger exclusion clauses in the tenant's policy (I B C)

**Palmer v Transport Accident Commission** (VSCA) - applicant had not disentangled the effect of a transport injury from the effect of an earlier workplace injury, and had thereby failed to show the transport injury was 'serious injury' entitling her to sue for damages (I)

## HABEAS CANEM

### Pig, Dog and Bougainvillea



# Benchmark

## Summaries With Link (Five Minute Read)

### **Joudo v Joudo [2024] NSWCA 258**

Court of Appeal of New South Wales

Bell CJ, Gleeson, & Stern JJA

Constructive trusts - the appellant alleged she had an oral agreement with the respondent whereby the appellant agreed to lease property to the respondent and her children for \$600 per week - the appellant commenced proceedings for \$181,800 in unpaid rent for the prior 6 years (accepting that a claim for earlier rent was statute barred) - the respondent and her husband cross-claimed, contending that the agreement was that the appellant would build a house for the respondent and her family to live in for life, on condition that the respondent and her husband would assist in completing the construction of the home, pay utilities, and maintain the home and the property - the property had been sold, and the respondent and her husband sought a declaration that the appellant had held it on constructive trust, and that the proceeds of sale should be distributed to the parties in repayment of their contributions with any surplus to be split equally, or, in the alternative, equitable compensation - the primary judge held that the respondents' constructive trust claim succeeded (see Benchmark 21 March 2024) - the appellant appealed - held: there was mutual economic benefit for both the appellant and the respondents in the joint endeavour - in any event, the proposition that there must be mutual economic benefit before a constructive trust may be imposed has been rejected in NSW - similarly, the proposition that a constructive trust can only be imposed where the parties have not adverted to what would happen to a property the subject of a joint endeavour if the basis of the arrangement were removed would impose an unattractive fetter on an equitable remedy whose flexibility is central to its operation - the primary judge did not err by treating the series of mortgage payments made by the respondents to discharge the appellant's obligations under the mortgage as contributions to the joint endeavour - these payments bore the objective character of contributions and could bear that character even though they were not initially contemplated when the joint endeavour was formed and were motivated by a desire to assist the appellant discharge her immediate legal obligations in relation to the mortgage - it was the entire nature of the agreement between the parties that the respondents would live in the property rent-free on the condition that they contributed to its construction, maintenance, and improvement, which they did, and it was the departure from that arrangement, following the breakdown of the relationship, with the consequent move to evict the respondents, and the appellant retaining the benefits of their material contributions in a way that was not intended, that rendered the circumstances unconscionable and warranted the imposition of a constructive trust - to require the value of notional rent to be taken into account and deducted from the contributions would be to change the arrangement entirely - appeal dismissed.

[View Decision](#) (I B C)

### **BlueCourt of Appeal of New South Wales Mirror Pty Ltd v Tan & Tan Australia Pty Ltd (in liq) [2024] NSWCA 253**

Ward P, Leeming, & Mitchelmore JJA



# Benchmark

Equity - Blue Mirror claimed it paid about \$10 million to Pegasus to be held on trust pending the sale by Pegasus to Blue Mirror of one million boxes of nitrile examination gloves - Blue Mirror claimed that Pegasus misappropriated the funds in breach of trust, and paid a substantial part of that money to other defendants - Blue Mirror claimed that the other defendants received the money from Pegasus knowing that its transfer was in breach of trust, or that they assisted (with the requisite knowledge) Pegasus in its dishonest and fraudulent breach of trust, or that they were volunteers who had received money obtained by fraud and who had learnt that the money was misappropriated, and Blue Mirror also claimed repayment from those defendants as money had and received - the primary judge dismissed Blue Mirror's claim (see Benchmark 6 February 2024) - Blue Mirror appealed - held: the primary judge had erred by regarding the absence of a reply to be significant, and in holding that, as there was no pleaded allegation by Blue Mirror that documents had been fraudulently concocted, the defendants were entitled to rely upon their prima facie evidentiary effect - there is no general obligation upon a plaintiff to file a reply, although there was an entitlement to do so if a plaintiff so chooses - a party must plead specifically any matter that, if not pleaded specifically, may take the opposite party by surprise - absent any reply, there was an implied joinder of issue on the defence, the effect of which was to operate as a denial of every allegation of fact made in the defence - the absence of a reply did not elevate the status of the impugned documents at the heart of the defendants' case to some 'prima facie evidentiary effect' - the primary judge had also erred in considering that Blue Mirror had a forensic obligation to serve subpoenas, which had had the effect of imposing an onus on Blue Mirror to take certain forensic steps, failing which a defendant's positive case would be accepted - the fact-finding process at trial had also miscarried, and it was necessary for the Court to intervene - far from feeling any actual persuasion, the Court entirely unpersuaded that the defendants made out their positive case - appeal allowed.

[View Decision](#) (I B)

## **M1 v R1 [2024] NSWCA 256**

Court of Appeal of New South Wales

Leeming & Mitchelmore JA, & Price AJA

Civil procedure - the applicant sued his former wife and his former wife's solicitor in defamation in respect of four publications allegedly made in the context of family law proceedings - the primary judge granted summary dismissal on the application of the wife and her solicitor - the primary judge declined to recuse herself from dealing the costs, and made a gross sum costs order against the applicant - the applicant sought an extension of time to apply for judicial review of both the primary judgment and the costs judgment, pursuant to s69 of the *Supreme Court Act 1970* (NSW), on the basis that he was denied procedural fairness, the primary judge was affected by apprehended bias, the quantum of the gross sum costs order was unreasonable, the primary judge's reasons were inadequate, and the primary judge had failed to respond to all of his allegations and considered irrelevant material - held: UCPR r59.10(3) provides that in considering whether to extend time for applications for judicial review, the court should take account of such factors as are relevant in the circumstances of the particular case, including (a) any particular interest of the plaintiff in challenging the decision; (b) possible

prejudice to other persons caused by the passage of time, if the relief were to be granted, including but not limited to prejudice to the parties to the proceedings; (c) the time at which the plaintiff became or, by exercising reasonable diligence, should have become aware of the decision; and (d) any relevant public interest - the argument that, because a judge in the Court below had ordered proceedings should continue on the pleadings, the primary judge did not have jurisdiction to dismiss the summons, had no merit - the primary judge had not denied the applicant procedural fairness - the applicant's submission that the primary judge had no jurisdiction to find that he had breached the implied undertaking concerning material produced on subpoena in the family law litigation misunderstood the primary judge's decision that the defamation proceedings were an abuse of process because the publications derived from the material that the applicant could only have obtained because it was produced on subpoena in the family law proceedings - the applicant had not established any reviewable error in the primary judgment or the cost judgment - having regard to the passage of time since the primary decision was made, the absence of any satisfactory explanation for the delay, and the lack of merit or public interest in his grounds of review, extension of time refused.

[View Decision](#) (I)

## **Marahra Holdings Pty Limited v Insurance Australia Limited [2024] NSWSC 1368**

Supreme Court of New South Wales

Schmidt AJ

Civil procedure - Marahra owned industrial property which it leased to Metal World Recycling Pty Ltd, a scrap metal and recycling business - the premises were damaged in a fire - Marahra sued Metal World, contending that the fire was caused by Metal World's breach of various provisions of its lease and by negligence for which Metal World was vicariously liable - Marahra also pursued damages against Metal World's public liability insurer, relying on Metal World's policy, as well as s51 of the *Insurance Contracts Act 1984* (Cth), the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), and s601AG of the *Corporations Act 2001* (Cth) - Marahra sought leave to file and serve an amended statement of claim, as its new lawyers had formed the view that they would need to withdraw various factual allegations regarding the mechanism of the fire, and replace these with a plea of *res ipsa loquitur* - the insurer opposed leave, saying the facts to be withdrawn were facts that it relied upon to trigger exclusion clauses in the policy, and the practical result of the proposed amendments would be to effectively reverse the onus of proof in relation those facts which had already been admitted - held: a plea of *res ipsa loquitur* involves a process of reasoning that, if an occurrence which has caused injury is of a kind that within the common knowledge and experience of people would not ordinarily occur without negligence, proof that the event occurred may itself be sufficient to raise a case which calls for explanation by the defendant - however, this requires a finding that the accident would not ordinarily have occurred without negligence on the part of the defendant - the Court was not persuaded that the proposed amendments were only sought or resisted for improper tactical reasons - leave to withdraw the factual allegations was required under UCPR r12.6(2) - to obtain leave, Marahra had to provide good reason for withdrawing what was previously common ground - Marahra's new solicitor's unchallenged evidence that he

considered that the facts sought to be withdrawn were not supported by the available evidence was such a good reason - if the insurer wished to rely on such facts to establish that the exclusions clauses were engaged, it would have to prove them, if Marahra's evidence did not - leave granted to file the amended statement of claim.

[View Decision](#) (I B C)

## **Palmer v Transport Accident Commission [2024] VSCA 254**

Court of Appeal of Victoria

Niall, Walker, & Macaulay JJA

Accident compensation - the applicant injured her left shoulder in the course of her employment - about nine months later, the applicant was involved in a transport accident which resulted in injury to her neck - the applicant sought leave under s93(4)(d) of the *Transport Accident Act 1986* (Vic) to sue for damages for the injury allegedly sustained in the transport accident - the applicant had to show she had suffered a 'serious injury' within the meaning of s93(4)(d) - the primary judge dismissed this application, finding that the applicant had not 'disentangled' the consequences of the transport injury from the workplace injury - the applicant sought leave to appeal - held: this was an appeal by way of rehearing on identification of error - the standard of review was the correctness standard, not that of *House v The King* - the primary judge considered the applicant to be a truthful witness, but considered some of her recollections to be unreliable - the trial judge had enjoyed an advantage over the Court in making such an assessment - the onus had been on the applicant to disentangle the effect of the two injuries - the primary judge had directed herself correctly in terms of principle - the primary judge had correctly identified that the term 'serious injury' required the impairment and its consequences to be viewed objectively and judged on an external comparative basis against possible impairments not necessarily in the same category - the primary judge was not satisfied that the pain caused by the transport injury satisfied the serious injury threshold - having reviewed the evidence for itself, Court considered that the primary judge's conclusion on this issue was correct - there was no error in the primary judge's conclusion that the transport accident injury had not detrimentally impacted the applicant's work capacity in any significant way - the primary judge was correct not to be satisfied that the applicant curtailed her dog showing activities as a result of the transport injury rather than the workplace injury - the primary judge was correct to conclude that the applicant did not discharge her onus to disentangle the transport injury from the workplace injury - a judge is required to set out findings on material questions of fact, refer to the relevant evidence, and provide an intelligible explanation of the process of reasoning that led the judge from evidence to conclusion - the primary judge's reasons were adequate - leave to appeal refused.

[Palmer](#) (I)





## Poem for Friday

### Echo

By Christina Rossetti (1830-1894)

Come to me in the silence of the night;  
Come in the speaking silence of a dream;  
Come with soft rounded cheeks and eyes as bright  
As sunlight on a stream;  
Come back in tears,  
O memory, hope, love of finished years.

Oh dream how sweet, too sweet, too bitter sweet,  
Whose waking should have been in Paradise,  
Where souls brimfull of love abide and meet;  
Where thirsting longing eyes  
Watch the slow door  
That opening, letting in, lets out no more.

Yet come to me in dreams, that I may live  
My very life again tho' cold in death:  
Come back to me in dreams, that I may give  
Pulse for pulse, breath for breath:  
Speak low, lean low,  
As long ago, my love, how long ago.

**Christina Georgina Rossetti**, born on 5 December, 1830, was one of the foremost poets of her era. Her father, Gabrielle, was an Italian Poet, and later chair of Italian at King's College, in London. Her mother Frances Polidor, an Anglo-Italian, home schooled her children in a climate of intellectual excellence. From 1845 Christina, by then a prolific poet, suffered an illness, that some consider was at least influenced by mental illness. She continued to have bouts of serious illness throughout her life. Rossetti's poetry, included the collections *Goblin Market and other Poems* (1862), *The Prince's Progress* (1866), *A Pageant* (1881), and *The Face of the Deep* (1882). Christina Rossetti died on 29 December, 1894.

**Stanford Chamber Chorale**, conductor, Stephen M Sano, with Laura Dahl, pianist, sing Norman Dello Joio's **Come to Me, My Love**, a setting of Christina Rossetti's "Echo"

<https://www.youtube.com/watch?v=NyJs5oqyygs>

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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