

Friday, 4 August 2023

## 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)

**CCIG Investments Pty Ltd v Schokman** (HCA) - an employer was not vicariously liable for the act of an employee of urinating upon another employee in the shared accommodation provided by the employer (I B)

**Disorganized Developments Pty Ltd v South Australia** (HCA) - regulations purportedly making land a "prescribed place" upon which it was unlawful for members of a criminal organisation to enter were invalid (B C I)

**Callan v Chawk** (FCA) - plastic surgeon successful in defamation action against former patient who posted a negative online review (I)

**Ahmed Mahdi Pty Ltd v Cinque Enterprise Pty Ltd** (VSC) - special condition that the purchaser may not complain about the condition of the property reversed the general contractual allocation of risk to the vendor where a fire had damaged the property (I B C)

## HABEAS CANEM

Inevitable perfect landing



## Summaries With Link (Five Minute Read)

### **CCIG Investments Pty Ltd v Schokman [2023] HCA 21**

High Court of Australia

Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson, & Jagot JJ

Negligence - Schokman was urinated upon by a drunk co-worker while sleeping at their shared accommodation supplied by their employer - the likelihood was that the co-worker intended to urinate into the toilet but, due to his state of intoxication and the late hour, urinated on Schokman by mistake - Schokman suffered a cataplectic attack as a result of the incident - Schokman sued his employer, both directly in negligence and as vicariously liable for the actions of the other co-worker - both claims failed - the Queensland Court of Appeal allowed Schokman's appeal regarding the vicarious liability claim - Schokman was granted special leave to appeal to the High Court on the vicarious liability claim - held (by Kiefel CJ, Gageler, Gordon & Jagot JJ, with whose orders Edelman, Steward, and Gleeson JJ agreed): for an employer to be liable for an employee's tort, the common law requires that the employee's tortious act be committed in the course or scope of the employment - although this may be stated in simple terms, in many cases the resolution of that question can prove difficult - the identification of what the employee was actually employed to do and was held out as being employed to do is central - whether an act was committed in the course or scope of employment is not determined by reference to whether the employee's act can be said to have been authorised by the employer - that the employment provides an opportunity for the employee's wrongful act to take place is a tenuous connection - this is to be distinguished from cases where the employer places an employee in a special position so that the ostensible performance of the employer's work "gives occasion" for the act - in this case, the co-worker was not assigned any special role concerning Schokman and no part of what the co-worker was employed to do was required to be done in the accommodation - whether the employer had a duty of care to protect Schokman does not arise in a case concerning vicarious liability - nothing pointed to the drunken act in question being authorised, being in any way required by, or being incidental to, the employment - held further (by Edelman & Steward): by using vicarious liability as a broad concept that extends to various different areas of law where liability arises "despite the employer not itself being at fault", courts have created in vicarious liability an unstable principle - unless the different areas of law with which vicarious liability is concerned are identified and kept distinct, courts may be driven to absurd and distorted reasoning - held further (by Gleeson J): the terms of the co-worker's employment did not serve to connect the tortious conduct to the work that he was employed to perform, but only served to reinforce the evident connection between the co-worker and the employer as licensee and licensor of the accommodation for the period in which the co-worker was employed - it was not suggested that that relationship of licensee and licensor could give rise to vicarious liability for the act in question - appeal allowed.

[CCIG Investments Pty Ltd \(I B\)](#)

### **Disorganized Developments Pty Ltd v South Australia [2023] HCA 22**

High Court of Australia

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Kiefel CJ, Gageler, Steward, Gleeson, & Jagot JJ

Statutory interpretation - s83GD(1) of the *Criminal Law Consolidation Act 1935* (SA) makes it an offence for a participant in a criminal organisation to enter or attempt to enter a "prescribed place" - the Hells Angels motorcycle club is a criminal organisation for the purposes of that section - two regulations made under the Act, the *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place-Cowirra) Variation Regulations 2020* (SA) and the *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place-Cowirra) (No 2) Variation Regulations 2020* (SA), purported to declare a portion of land in Cowirra, east of Adelaide, as a "prescribed place" - each Regulation applied to land comprised in one particular certificate of title - Disorganized Developments was the registered proprietor of that land, and two members of the Hells Angels were its directors and shareholders, and occupied the land - the Court of Appeal of South Australia, on a case stated by a single judge of the Supreme Court, held that the Regulations were valid - Disorganized Developments and its two directors were granted special leave to appeal to the High Court - held (by the whole Court): the text of the Regulations did not directly declare the two blocks to be prescribed places, but amended the *Criminal Law Consolidation (Criminal Organisations) Regulations 2015* (SA) by adding the two certificate of title numbers to a list in the 2015 Regulations of places declared to be prescribed places by certificate of title - as a matter of ordinary English, a "declaration" is a positive statement or proclamation - to declare a place to be a prescribed place by regulation requires a positive statement that the relevant place is a prescribed place - even assuming that a declaration could be made impliedly, the language of the Regulations was to the opposite effect, purporting to leave the operative act of declaring the lots to be prescribed places to the 2015 Regulations, which did not have that effect - as the Regulations do not declare any place to be a prescribed place, and as the variation of the 2015 Regulations was ineffective for that purpose, it followed that the Regulations were not contemplated by, or necessary or expedient for the purposes of, the *Criminal Law Consolidation Act* and were not supported by the Governor's regulation-making power - held further (Kiefel CJ, Gageler, Gleeson, & Jagot JJ, Steward J dissenting): the existence of a duty to afford procedural fairness is a question of statutory interpretation - there is a strong common law presumption that requires the provision of procedural fairness where the relevant power directly affects the rights or interests of a particular individual - under this legislation, procedural fairness required reasonable notice to an owner or occupier of a proposal to declare a place a prescribed place, to give them an opportunity to supply information or make submissions as to matters within their knowledge as an owner or occupier that may be relevant to a decision to exercise the declaration power - appeal allowed.

[Disorganized Developments Pty Ltd](#) (B C I)

## **Callan v Chawk [2023] FCA 898**

Federal Court of Australia

Halley J

Defamation - Callan performed a rhinoplasty procedure on Chawk - Chawk then posted a negative review of the procedure on an internet ratings website for medical practitioners - Callan sued both Chawk and the publisher of the website - he alleged that the review conveyed

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imputations that (1) he had performed the rhinoplasty procedure negligently, (2) he had negligently failed to correct Chawk's deviated septum, (3) he had performed the procedure so incompetently that Chawk suffered a debilitating nasal valve collapse, and (4) he had ruined Chawk's self-esteem and self-confidence by "botching" a rhinoplasty procedure - Chawk denied that the review conveyed the four imputations and also relied on the defences of honest opinion (s31 of the *Defamation Act 2005* (NSW)) and qualified privilege (s30 of that Act) - a defence of contextual truth was abandoned in closing submissions - Callan settled with the publisher of the website before trial - held: the Federal Court had jurisdiction because Callan had made a "non-colourable" assertion of federal jurisdiction in his statement of claim by alleging that the review was downloaded and comprehended by a particular person in the ACT - s9(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) confers on the Federal Court the jurisdiction of the Supreme Courts of the Northern Territory and the ACT to hear and determine defamation matters that would be within their jurisdiction - the Court was not satisfied that Callan had established substantial publication of the review - whether the defamatory meanings were conveyed is a question of fact and requires consideration of what the publication would have conveyed to an ordinary reasonable reader - imputations (1), (2), and (3) as set out above were conveyed by the review - there was no dispute that the imputations were defamatory - the ordinary reasonable reader would understand the review as an opinion based on the facts asserted - because certain parts of the materials relied on by Chawk as "proper material" under s31(5)(a) of the *Defamation Act* were shown to not be substantially true, the defence of honest opinion could not succeed - the defence of qualified privilege under s30 of the *Defamation Act* applies where (a) the recipient has an interest or apparent interest in having information on some subject, and (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances; and the onus then shifts to the plaintiff to prove the publication was actuated by malice - Callan conceded elements (a) and (b) - Chawk had not established that publishing the review was reasonable - an award of damages of \$50,000 was sufficient consolation for hurt feelings, recompense for damage to reputation and vindication.

[Callan](#) (I)

## **Ahmed Mahdi Pty Ltd v Cinque Enterprise Pty Ltd [2023] VSC 445**

Supreme Court of Victoria

McDonald J

Contracts for the sale of land - the plaintiff contracted to sell land to the defendant - the dwelling on the land was derelict and vacant, and the defendant intended to purchase the property and develop it into 13 townhouses - after exchange, the dwelling was damaged in a fire - the plaintiff sought to claim on its insurance policy, but the plaintiff's insurer denied the claim, based on a report that found the cause of the fire was deliberate ignition - the defendant's solicitor wrote to the plaintiff's solicitor enclosing a report from a surveyor estimating the costs of replacing the dwelling to be \$861,000, exclusive of GST, and demanding compensation by way of a reduction in the contract price - following further correspondence, the defendant issued a notice of rescission - held: general condition 31.1 of the contract of sale provided that the vendor carried

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the risk of loss or damage to the property before settlement - special condition 8(iv) provided that, despite anything else in the contract and to the maximum extent permitted by law and equity, the purchaser may not make any objection, claim compensation, bring any action, suit or proceeding, seek any order, delay completion or end this contract as a consequence of the condition of the property - special condition 8(iv) should not be construed as restricted to the condition of the property at the time of sale - special condition 8(iv) prevailed over general condition 31.1 and reversed the contractual allocation of risk - special condition 8(iv) therefore restricted the capacity of the defendant to end the contract as a consequence of the condition of the property - declaration granted that the defendant was not entitled to terminate the contract of sale based on its notice of rescission.

[Ahmed Mahdi Pty Ltd](#) (I B C)



## Poem for Friday

### Sonnet XVIII: Shall I Compare Thee to a Summer's Day

**By:** William Shakespeare (1564-1616)

Shall I compare thee to a summer's day?  
Thou art more lovely and more temperate:  
Rough winds do shake the darling buds of May,  
And summer's lease hath all too short a date;  
Sometime too hot the eye of heaven shines,  
And often is his gold complexion dimm'd;  
And every fair from fair sometime declines,  
By chance or nature's changing course untrimm'd;  
But thy eternal summer shall not fade,  
Nor lose possession of that fair thou ow'st;  
Nor shall death brag thou wander'st in his shade,  
When in eternal lines to time thou grow'st:  
    So long as men can breathe or eyes can see,  
    So long lives this, and this gives life to thee.

**William Shakespeare** (1564-1616), was an English playwright and poet. He was baptised in Holy Trinity Church in Stratford-upon-Avon on 26 April, 1564. He attended the King's New School. He married Anne Hathaway at age 18. William Shakespeare is speculated to have worked as a country schoolmaster, law clerk, and soldier, although he was known as an actor and writer. In 1692 the public theatres in London were closed by order of the Privy Council due to a threat of plague, disrupting his work, however he continued to write. When the theatres reopened Shakespeare was working with the theatre troupe the Lord Chamberlain's Men, later the King's Men. He also sought patronage from the aristocracy, although he continued his work commercially as a professional writer. Shakespeare died on 23 April 1616 aged 52.

[https://en.wikipedia.org/wiki/William\\_Shakespeare](https://en.wikipedia.org/wiki/William_Shakespeare)

Sonnet 18, read by Sir John Gielgud

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

Sonnet 18, recited by Peter O'Toole, in the movie Venus (2006)

<https://www.youtube.com/watch?v=igy6cQM1DI8>

Sonnet 18, read by Sir Patrick Stewart

<https://www.youtube.com/watch?v=VYnj7ZutTgI>



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