



Friday, 8 March 2024

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)

ACT Plasterboard Pty Ltd v Pohorukov (NSWSC) - Court ordered judicial sale of property pursuant to equitable charge, after consideration of the position of third parties (I B C)

Lennox Smith bhnf Benjamin Smith v Central Coast Local Health District (NSWSC) - Court approved settlement of medical negligence litigation as being in the best interests of the plaintiff (I)

Campbell v Tran (NSWSC) - plaintiff who had tried to change careers to be a mortgage broker successfully sued his former mentor for misleading or deceptive conduct (I B)

Connelly v Transport Accident Commission (VSCA) - primary judge had erred in dismissing an application to commence a proceeding at common law claiming damages arising from a motor accident (I B)

Canadian Solar Construction (Australia) Pty Ltd v Re Oakey Pty Ltd (QSC) - principal ordered to pay amount of payment claim where the email serving the payment claim had bounced from its main recipient (I B C)

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Focus



Summaries With Link (Five Minute Read)

ACT Plasterboard Pty Ltd v Pohorukov [2024] NSWSC 218

Supreme Court of New South Wales

Peden J

Equity - Pohorukov signed a Confidential Credit Application with the ACT Plasterboard on behalf of AK Commercial Construction, and at the same time signed a Confidential Personal Guarantee and Indemnity Agreement - ACT Plasterboard provided AK Commercial with plasterboard and associated products on credit - AK Commercial entered into liquidation and ACT Plasterboard asserted a debt of about \$1.5million - ACT Plasterboard sought a judicial sale of real property owned by Pohorukov on the basis of an equitable charge - held: the Court accepted that the Credit Application and the Guarantee contained promises to guarantee the due and punctual performance of AK Commercial's obligations, including the punctual payment of invoices, and that Pohorukov granted ACT Plasterboard a charge over his interest in any real property owned - judicial sale is the standard remedy of an equitable charge, and, upon default, an equitable chargee is entitled as of right to an order for sale - an equitable chargee does not need to demonstrate what steps have been taken to enforce the charge, or any special entitlement to an order for judicial sale, and it suffices that the equitable chargee establishes that the charge exists, the charge is enforceable, and that there has been a default - however, the Court has a residual discretion, having regard to the position of third parties who will be adversely affected - it is appropriate to include protection in orders for a judicial sale, to ensure the registered mortgagee is not prejudiced - there was a real possibility that all those who claimed an interest in the property would not have their debts discharged from the proceeds of sale after the registered mortgage debts had been paid, and the parties who appeared accepted that a future determination of priority would be necessary - in circumstances where the sale proceeds may not be sufficient for all those entitled to an interest in them, the cost saving of the plaintiff being appointed to carry out the sale, rather than independent trustees being appointed, was of benefit to all parties - however, it was also appropriate to grant leave to any party to apply in relation to the progress of the sale process - there was no reason not to make an order for possession so that the sale could be carried out.

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

Lennox Smith bhnf Benjamin Smith v Central Coast Local Health District [2024] NSWSC 217

Supreme Court of New South Wales

Campbell J

Medical negligence - the plaintiff, by his father as next friend, sued the defendant for damages for medical negligence related to the misdiagnosis at a public hospital of a condition of retropharyngeal abscess when he was 6 years old, which allegedly caused irreversible bone destruction, and led to a permanent torticollis (an abnormal fixed posture of the neck) and a bony fusion at the C1/C2 level in his spine, resulting in a significantly reduced range of movement in the cervical spine, particularly in terms of axial rotation - the defendant admitted

breach of duty of care, although not liability *per se* - the parties asked the Court to approve an agreed settlement under s76(4) of the *Civil Procedure Act 2005* (NSW) - held: the Court had had the benefit of the confidential advice of counsel who practices extensively in the medical negligence area, and of an affidavit of the father - there was a dispute between the parties as to the likely future need for further surgical treatment as the plaintiff got older - in assessing likely future economic outcomes for untried children, it is not only unskilled work that can involve manual labour - the real issues were the cost of future treatment and the assessment of future economic loss - the Court considered whether settlement should be delayed, given that the defendant had effectively admitted liability and the plaintiff was currently 13 years old - however, the Court accepted the view expressed by counsel that, even at the age of 18, there would still be so many imponderables that there was little point to delaying settlement - the Court was satisfied that the sum proposed was in the plaintiff's best interests - there would be a margin of deduction for irrecoverable solicitor and client costs, which would be a matter for the approval of the fund manager in due course, but the amount estimated by the plaintiff's solicitor did not seem unreasonable, and other deductions for government charges were very modest - settlement approved.

[View Decision](#) (I)

Campbell v Tran [2024] NSWSC 204

Supreme Court of New South Wales

Meek J

Consumer law - Campbell sought to make a career change and took steps to become a mortgage broker - after meeting Tran via a training course, Campbell underwent mentorship arranged by Tran, for which he paid monies to Red Sienna, a company associated with Tran - Campbell and his wife sued Tran and Red Sienna, alleging that Campbell sold properties to Tran and paid over the proceeds to her in the belief, based on representations by Tran, that he was buying into a share of a business known as MAP Home Loans of which Tran was allegedly a part owner, whereas Tran was not a part owner, and that his dealings with her ended with his mentorship being terminated without him obtaining any tangible interest in the MAP Business or having any other property or financial interest of value in exchange for his payment of money and properties to Tran - held: the Court accepted that Tran had made representations that she was a part owner of MAP Home Loans and that Campbell could become a 50% owner in that business in exchange for particular payments - the Court was also satisfied that Tran made certain representations to Campbell by telephone, email, messaging, or online video conferencing for the purposes of s6(3)(a) of the *Competition and Consumer Act 2010* (Cth), which extends the operation of s18 of the *Australian Consumer Law* to persons who are not corporations - Tran knew these representations were false and intended that they would induce Campbell to sell the properties to her - in selling the three properties, Campbell relied upon and was motivated by these representations - Tran had contravened s18 of the *Australian Consumer Law* - it was not necessary to consider other alleged causes of action - the recoverable loss, assessed by reference to the so-called "rule in *Potts v Miller*" [1940] HCA 43; 64 CLR 282, focused, not on the difference between price and "market value", but on the

difference between price and "real value" - the Court considered specific amounts the plaintiffs were entitled to recover - parties to attempt to agree on the amount, or to separately provide their proposed orders and calculations.

[View Decision](#) (I B)

Connelly v Transport Accident Commission [2024] VSCA 20

Court of Appeal of Victoria

Beach & Niall JJA, & J Forrest AJA

Motor accidents - in 2012, the applicant was riding his pushbike and swerved to avoid a motor vehicle, and suffered an injury to his right knee - in 2021, the applicant sought leave in the County Court under s93(4)(d) of the *Transport Accident Act 1986* (Vic) to commence a proceeding at common law claiming damages, and an extension of time under s23A of the *Limitation of Actions Act 1958* (Vic) - the primary judge dismissed the proceeding, as she was not satisfied that that the consequences of the right knee injury could be described as 'very considerable' as required by the case law - the applicant sought leave to appeal - held: a decision whether an injury satisfies the 'very considerable' test is an evaluative one, but it is a decision that admits of only two answers: either the injury is a serious injury as defined in the *Transport Accident Act* or it is not - this appeal was an appeal by way of rehearing, which required the Court to conduct a real review of the evidence and, while observing the natural limitations that exist in the case of any appellate court proceeding wholly or substantially on the record, to give the judgment which in its opinion ought to have been given at first instance - at least since the High Court's decision in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] FCA 32, the approach mandated by previous authority, requiring an appellant in a serious injury appeal to show that, in the absence of specific error, the decision below was plainly wrong or wholly erroneous, could not be maintained - the applicant's credit was not in issue before the primary judge, who enjoyed little (if any) advantage over the Court of Appeal in determining whether the medical evidence showed the applicant had sustained a serious injury - while it is important to analyse 'what remains' so far as incapacity is concerned, that analysis must be seen in the context of what has been, and will be, lost - synthesising all relevant matters for itself, the Court was persuaded that the applicant's right knee injury met the very considerable test - leave to appeal granted, appeal allowed, and matter remitted to the County Court for determination of the application under s23A of the *Limitation of Actions Act*.

[Connelly](#) (I B)

Canadian Solar Construction (Australia) Pty Ltd v Re Oakey Pty Ltd [2023] QSC 288

Supreme Court of Queensland

Freeburn J

Security of payment - a contractor served a payment claim under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) on a principal for about \$4million by email - the email bounced from the address of its main recipient (the principal's representative), although it was successfully delivered to representatives of the project manager - the sender did not notice the notification that his email had bounced - the principal remained unaware of the email and did

Benchmark

not serve a payment schedule - the contractor sued, contending that the principal was liable to pay the amount of the claim - held: the principal was a special purpose vehicle, set up expressly for the purpose of this project, and with no employees or staff of its own, and operated through the efforts of the project manager and another company - the contract expressly provided that the project manager was the principal's agent for all of its functions under the contract - s102(1) of the Act provides that a document required to be given to a person may be given in a manner provided under the construction contract - the relevant clause of the contract provided for service by email to a particular address stated in the contract, but did not make that the exclusive way a payment claim could be served - the contractor had validly given the payment claim to the principal by sending it to the executives of the project manager - the Court was unable to infer from the evidence that the parties had the common assumption that payment claims could only be given by being delivered by email to the named principal's representative - the contractor was therefore not estopped from asserting that it had validly given the project claim to the principal - the mere appearance of names within the 'To' and 'cc' fields of an email does not represent that the email has in fact been delivered to the names listed, but merely represents that the sender has attempted to send the email to the persons listed - the contractor had therefore not engaged in misleading or deceptive conduct - nothing in the circumstances of this case established dishonesty in behaviour, or trickery or sharp practice, or any other basis for unconscionability under s21 of the Australian Consumer Law - principal ordered to pay the amount of the payment claim.

[Canadian Solar Construction \(Australia\) Pty Ltd](#) (I B C)



Poem for Friday

Up the Country

By: Henry Lawson (1867-1922)

I am back from up the country — very sorry that I went -
Seeking for the Southern poets' land whereon to pitch my tent;
I have lost a lot of idols, which were broken on the track,
Burnt a lot of fancy verses, and I'm glad that I am back.
Further out may be the pleasant scenes of which our poets boast,
But I think the country's rather more inviting round the coast.
Anyway, I'll stay at present at a boarding-house in town,
Drinking beer and lemon-squashes, taking baths and cooling down.

'Sunny plains!' Great Scott! — those burning wastes of barren soil and sand
With their everlasting fences stretching out across the land!
Desolation where the crow is! Desert where the eagle flies,
Paddocks where the lunny bullock starts and stares with reddened eyes;
Where, in clouds of dust enveloped, roasted bullock-drivers creep
Slowly past the sun-dried shepherd dragged behind his crawling sheep.
Stunted peak of granite gleaming, glaring like a molten mass
Turned from some infernal furnace on a plain devoid of grass.

Miles and miles of thirsty gutters — strings of muddy water-holes
In the place of 'shining rivers' — 'walled by cliffs and forest boles.'
Barren ridges, gullies, ridges! where the ever-madd'ning flies —
Fiercer than the plagues of Egypt — swarm about your blighted eyes!
Bush! where there is no horizon! where the buried bushman sees
Nothing — Nothing! but the sameness of the ragged, stunted trees!
Lonely hut where drought's eternal, suffocating atmosphere
Where the God-forgotten hatter dreams of city life and beer.

Treacherous tracks that trap the stranger, endless roads that gleam and glare,
Dark and evil-looking gullies, hiding secrets here and there!
Dull dumb flats and stony rises, where the toiling bullocks bake,
And the sinister 'gohanna', and the lizard, and the snake.
Land of day and night — no morning freshness, and no afternoon,
When the great white sun in rising bringeth summer heat in June.
Dismal country for the exile, when the shades begin to fall
From the sad heart-breaking sunset, to the new-chum worst of all.

Benchmark

Dreary land in rainy weather, with the endless clouds that drift
O'er the bushman like a blanket that the Lord will never lift —
Dismal land when it is raining — growl of floods, and, oh! the woosh
Of the rain and wind together on the dark bed of the bush —
Ghastly fires in lonely humpies where the granite rocks are piled
In the rain-swept wildernesses that are wildest of the wild.

Land where gaunt and haggard women live alone and work like men,
Till their husbands, gone a-droving, will return to them again:
Homes of men! if home had ever such a God-forgotten place,
Where the wild selector's children fly before a stranger's face.
Home of tragedy applauded by the dingoes' dismal yell,
Heaven of the shanty-keeper — fitting fiend for such a hell —
And the wallaroos and wombats, and, of course, the curlew's call —
And the lone sundowner tramping ever onward through it all!

I am back from up the country, up the country where I went
Seeking for the Southern poets' land whereon to pitch my tent;
I have shattered many idols out along the dusty track,
Burnt a lot of fancy verses — and I'm glad that I am back.
I believe the Southern poets' dream will not be realised
Till the plains are irrigated and the land is humanised.
I intend to stay at present, as I said before, in town
Drinking beer and lemon-squashes, taking baths and cooling down.

Henry Archibald Herzberg Lawson, Australian poet and writer, was born on 17 June 1867 in Grenfell, NSW, the son of Louisa Lawson, an Australian publisher and poet and Niels Herzberg, a miner, born in Norway. Louisa was the editor of *The Dawn*, a feminist paper. In about 1887, at 19 years of age, Henry Lawson moved to Sydney, joined his mother in publishing, went to night school to matriculate and worked, including as a painter, and later in Newcastle at Hudson Brothers Railway workshops. He had a relationship with Mary Gilmore in 1890.

Up the Country was first published in *The Bulletin* on 8 July 1892 under the title "Borderland". His poems painted a picture of rural and bush life in Australia that was realistic rather than idealised. His work popularised the Australian vernacular. He married, had two children and then after an unhappy marriage, divorced in 1903 after a long separation.

He was an alcoholic who suffered episodes of severe depression and poverty. He was incarcerated in Darlinghurst Gaol seven times over 4 years for non-payment of child support, wife and child desertion and drunkenness. He called the gaol "Starvinghurst



Gaol”.

From 1903 he boarded at Mrs Isabel Byers’ Coffee Palace in North Sydney, and she supported him, and championed his work for the rest of his life, writing letters and meeting publishers on his behalf and assisting him financially. Lawson died on 2 September 1922 at the home of Mrs Isabel Byers at Abbotsford in Sydney. He was given a state funeral attended by thousands, including Billy Hughes.

Paul J Mailath, actor, reads **Up the Country** by Henry Lawson

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

Libby Hathorn, Author and Poet, presents **Poets of Australia: Henry Lawson**, the story of the work and life of Henry Lawson, produced and published by the State Library of NSW

https://www.youtube.com/watch?v=XC-n_b0kV1c

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