



Friday, 8 September 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)

**AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs** (HCA) - Full Court of the Federal Court had had no jurisdiction to determine an appeal from a single judge, as there was no matter (B I)

**Synergy Scaffolding Services Pty Ltd v Alelaimat** (NSWCA) - order that an employer indemnify the Nominal Insurer set aside, and damages reduced (I B C)

**May v Northern Beaches Council** (NSWCA) - leave to appeal refused regarding dismissal of judicial review proceedings over a neighbour's development (I B C)

**Asuramanage v Anglican Aged Care Services Group & Ors** (VSC) - medical panel did not fail to take relevant considerations into account and did not fail to give adequate reasons (B I)

**Haidari v Victorian WorkCover Authority** (VSC) - medical panel had not taken irrelevant considerations into account or made any other jurisdictional errors (B I)

## HABEAS CANEM

Cattle dog and cow



# Benchmark

## Summaries With Link (Five Minute Read)

### **AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 26**

High Court of Australia

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

Migration - Rangiah J of Federal Court made an order in the nature of mandamus requiring the Minister to move the appellant to a regional processing country under s198AD of the *Migration Act 1958* (Cth) and that appellant be held in home detention until that occurred - Nauru, then only regional processing country designated under the Act, after primary judge's decision informed Australia it would not accept the appellant - Minister then exercised discretion under s198AE to determine that that s198AD did not apply to the appellant - Jagot, Mortimer, & Abraham of the Full Court of the Federal Court allowed the Minister's appeal - High Court held (by majority, Gleeson J dissenting) that there was no "matter" within the meaning of Chapter 3 of the Constitution before the Full Court of the Federal Court, and that Court therefore had no jurisdiction to determine the appeal - appeal to High Court allowed - primary judge's orders at time of Full Court appeal had no operative legal effect.

[AZC20](#) (B I)

### **Synergy Scaffolding Services Pty Ltd v Alelaimat [2023] NSWCA 213**

Court of Appeal of New South Wales

Meagher & Kirk JJA, & Simpson AJA

Negligence - Alelaimat was seriously injured on a building site in Artarmon - scaffolding, which had been erected to a height of three storeys, was being dismantled by workmen wearing orange shirts bearing the words "Synergy Scaffolding" - Alelaimat was struck by a piece of metallic scaffolding that fell from above - he claimed and was paid compensation pursuant to the *Workers Compensation Act 1987* (NSW) - he commenced proceedings in negligence against Synergy, naming the Workers Compensation Nominal Insurer as the second defendant - the primary judge found for Alelaimat, and ordered Synergy to pay damages of about \$1.4million, and to indemnify the Nominal Insurer in regard to certain payments made by it - Synergy appealed, but did not challenge the finding that it was negligent - held: as to whether Alelaimat's cause of action against Synergy was discoverable more than three years before proceedings were commenced, s50D(1)(b) of the *Limitation Act 1969* (NSW) does not require knowledge of the capacity in which a putative defendant might be liable - it requires knowledge that the circumstances in which the injury occurred are such that legal liability could be established - whether Synergy was Alelaimat's employer, or no more than an occupier of premises, had no necessary relevance - Synergy had established that, for the purposes of s50D(1)(b), Alelaimat knew, at least by 2013, that his injury was caused by the fault of Synergy - however, Alelaimat did not know for the purposes of s50D(1)(c) that the injury was sufficiently serious to justify the bringing of an action on the cause of action - the issues here were more complex, and could not be properly evaluated by a lay person without adequate legal advice - the primary judge had not erred in finding that Synergy's *Limitations Act* defence failed - a

tortfeasor seeking to establish an entitlement to contribution or indemnity from another tortfeasor under s5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) bears the burden of establishing that entitlement - the effect of s151Z(2)(c) of the *Workers Compensation Act* is that, where a worker has a cause of action for damages against both employer and a third party tortfeasor, the damages ultimately recoverable from the third party tortfeasor is equal to the total damages which would be recoverable but for the operation of s151Z(2), minus the difference between the sum that the third party tortfeasor would be entitled to recover from the employer tortfeasor as contribution under s5 of the *Law Reform (Miscellaneous Provisions) Act 1946* but for the operation of s151Z(2)(d), and the amount of contribution that is actually recoverable under s5 once s151Z(2)(d) is taken into account - judgment sums reduced, and the order that Synergy indemnify the Nominal Insurer set aside.

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

## **May v Northern Beaches Council [2023] NSWCA 205**

Court of Appeal of New South Wales

Meagher & Payne JJA

Planning law - a resident of Church Point sought and obtained development consent from Northern Beaches Council to build a family home, and Council later approved two modifications to that consent - a private certifier issued a construction certificate for the development - May, a next door neighbour, made a number of complaints about the development, principally that Council did not comply with various regulations or development plans when granting its consent or the later modifications - May commenced judicial review proceedings in the Land and Environment Court's Class 4 jurisdiction after the construction of the development was well underway, challenging the original development consent, the decision to issue a construction certificate, and both modification decisions - the primary judge summarily dismissed the judicial review proceedings - May sought leave to appeal - held: May did not challenge the legal test applied by the primary judge in striking out his claim - May had conceded that, in granting modifications to a development consent (governed at the time by s96 of the *Environmental Planning and Assessment Act 1979* (NSW)), he did not challenge Council's decision to approve the modification - the only relevant issue before the primary judge was whether the four decisions challenged were affected by jurisdictional error - the merits of the underlying decisions were not properly before the primary judge - two of the appeal grounds conflated the administrative step of May's civil enforcement proceedings being held in abeyance pending the outcome of the application for leave to appeal with a revocation of leave to replead the civil enforcement part of his claims - the primary judge had been correct that the application for review of the consent decision, the first modification, and the construction certificate was brought out of time - nothing in the primary judge's approach to May's arguments regarding cl4.3 of the *Pittwater Local Environmental Plan 2014*, s96 (now s4.55) of the *Environmental Planning and Assessment Act*, or cl98E of the *Environmental Planning and Assessment Regulation 2000* (NSW), warranted a grant of leave - leave to appeal refused.

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

## **Asuramanage v Anglican Aged Care Services Group & Ors [2023] VSC 525**

Supreme Court of Victoria

O'Meara J

Workers compensation - the plaintiff was employed by Anglican Aged Care Services Group as a personal care attendant - while the plaintiff was attending a patient with dementia she claimed that the patient pulled her forward, and she suffered sudden severe pain in her low back which radiated round to her front and into her groin and upper thighs, and that she was incontinent of urine and was in so much pain that she could not move - an MRI scan revealed an annular tear at the L4/L5 disc - she lodged a workers compensation claim - the claim was accepted and the agent accepted she had an annular tear with mild disc prolapse at L4/5 region - the agent later advised the plaintiff that her combined physical whole person impairment and psychiatric whole person impairment had each been assessed at 0% and, consequently, she was not entitled to an impairment benefit - medical questions were referred to a medical panel, which found 0% impairment, and that the plaintiff did not have an accepted injury which had resulted in a total loss injury - the plaintiff sought judicial review of the medical panel's opinion - held: the function of a medical panel is to form and to give its own opinion on the medical question referred to it for its opinion - the medical panel must afford procedural fairness, and must give reasons that explain the actual path of reasoning by which it in fact arrived at its opinion - a medical panel has no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else - the medical panel did not fail to take account of a relevant expert opinion - the medical panel's reasons made it plain how it was that the panel came to assess the plaintiff's impairment as falling within the category that it found - proceedings dismissed.

[Asuramanage](#) (B I)

## **Haidari v Victorian WorkCover Authority [2023] VSC 522**

Supreme Court of Victoria

Niall JA

Workers compensation - the plaintiff was employed as a plasterer and suffered an alleged workplace injury - he made a claim for compensation under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - a number of medical questions were referred to a medical panel - the medical panel found that the plaintiff had a current work capacity - the plaintiff sought judicial review of the panel's opinion - held: the medical panel had provided reasons, as it was obliged to do - inadequacy of reasons for the decision would support an order in the nature of certiorari - to be adequate, the reasons had to explain the actual path of reasoning by which the medical panel in fact arrived at the opinion it in fact formed on the medical question referred to it - this must be done in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law - when an inference is to be drawn by way of the opinion of a medical panel as to the nature, extent, and severity of a medical condition, it will be for the panel to identify the relevant facts and evaluate the weight to be given to particular circumstances in light of its medical knowledge and experience - the panel concluded that the plaintiff could undertake the identified tasks in relation to the three positions - no jump in logic or

fact was required, and the conclusion, as a matter of inference, flowed naturally from the findings in respect of the plaintiff's participation in the ordinary incidents of daily life - the fact that the plaintiff did not accept those findings of fact did not render the medical panel's reasons inadequate - the panel clearly explained why it had formed a different conclusion to a previous panel - the panel was obliged to have regard to the material, including the history, provided by the plaintiff in support of his claim, and a panel commits jurisdictional error if it fails to give genuine consideration to this material - however, it does not follow that the panel will have made a jurisdictional error if it makes an error of fact as part of that consideration - taking an irrelevant consideration into account in this context means taking in to account a matter that the statute, either expressly or by implication, prohibits the decision-maker from taking into account - the merits of a decision are for the decision-maker and there is no jurisdictional error in the making of an erroneous factual finding - in certain circumstances, the making of an error of fact may constitute an error of law, and, again in certain circumstances, that error may be jurisdictional - no jurisdictional errors were established here - proceedings dismissed.

[Haidari](#) (B I)



## Poem for Friday

### My Dead Dream

**By:** Sarojini Naidu (1879-1949)

Have you found me, at last, O my Dream? Seven eons ago  
You died and I buried you deep under forests of snow.  
Why have you come hither? Who bade you awake from your sleep  
And track me beyond the cerulean foam of the deep?  
Would you tear from my lintels these sacred green garlands of leaves?  
Would you scare the white, nested, wild pigeons of joy from my eaves?  
Would you touch and defile with dead fingers the robes of my priest?  
Would you weave your dim moan with the chantings of love at my feast?  
Go back to your grave, O my Dream, under forests of snow,  
Where a heart-riven child hid you once, seven eons ago.  
Who bade you arise from your darkness? I bid you depart!  
Profane not the shrines I have raised in the clefts of my heart.

**Dr. Sarojini Naidu**, born Sarojini Chattopadhyaya, in Hyderabad, India on 13 February 1879, was a child prodigy, and considered to be brilliant intellectually as a poet, linguist, writer and political activist. She won a scholarship to Kings College, London where she studied from 1895, when she was 16 years of age, and later at Madras University and Girton College, Cambridge. She married in 1898, to Dr Naidu, a marriage supported by both their parents, although the inter-caste marriage was at that time in India considered to be against societal norms, and even criminal in some parts of society. They had five children. She spoke many languages fluently. In 1905 she joined the Indian Nationalist Movement, and met Mahatma Gandhi in 1916. She worked in the movement for freedom for India from British control, and for women's rights and civil rights. For 3 years from 1915 she travelled throughout India giving political lectures. She was arrested and imprisoned for two years because of her political activism. In 1925 she became the President of the Indian National Congress and from 1947 she was Governor of the United Provinces (later Uttar Pradesh). She received the Hind Kesari medal in 1928. She wrote books, poetry and songs throughout her life. She died on 2 March 1949. As a poet, she was referred to as the "Nightingale of India". Her birthday, 13 February, is celebrated as Women's Day in India.

[https://en.wikipedia.org/wiki/Sarojini\\_Naidu](https://en.wikipedia.org/wiki/Sarojini_Naidu)

**Sarojini Naidu**, gives a speech in the USA on her arrival in 1928

[Sarojini Naidu, gives a speech in the USA on arrival](#)

**Dr Sarojini Naidu**, 11 December 1946, Constituent Assembly Speech,

# Benchmark



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