

Friday, 8 November 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)

Australian Securities and Investments Commission v Ryan (FCA) - Court dismissed breach of director's duties claim where a director relied on solicitors' advice when approving a deed between the company and its parent that ASIC claimed was intended to prejudice the company's creditors (I B)

Hun v Aljazeera International (Malaysia) SDN BHD (No 3) (FCA) - paragraphs of defence dealing with justification defence to defamation action struck out, as were certain paragraphs dealing with mitigation of damages - leave to file amended defence refused (I)

Frank v Angell (NSWCA) - the standard of appellate review of the determination required by s59(1)(b) of the *Succession Act 2006* (NSW) (whether there were factors warranting a family provision application), is the *House v The King* standard, rather than the correctness standard (B I)

Lamichhane v Plumbcorp Solutions Pty Ltd (NSWSC) - public liability insurers of defendants to negligence action who had gone into liquidation joined to the proceedings under the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) (B C I)

Gupta v State of South Australia (SASC) - claim for breach of an equitable duty of confidence against doctor who had provided applicant's medical information to an insurer considering a TPD claim failed, as the applicant had authorised the doctor to release the information to the

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insurer on the claim form (B I)

State of Tasmania v Cane (TASSC) - Tasmanian Civil and Administrative Tribunal correctly decided it did not have jurisdiction to decide a workers compensation dispute pursuant to s80A of the *Workers Rehabilitation and Compensation Act 1988* (Tas) (I B)

HABEAS CANEM

The Puppy's First Festival



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Summaries With Link (Five Minute Read)

Australian Securities and Investments Commission v Ryan [2024] FCA 1267

Federal Court of Australia

O'Callaghan J

Directors' duties - DASS was wholly owned by EPO - EPO provided services to DASS such as staff, premises, and technology systems, in return for a management fee of 90% of DASS's gross revenue - Ryan was a director of DASS and EPO at various times - DASS's revenues declined as it began to face complaints of conflicted advice to clients to invest in its own financial products, in particular the US Masters Residential Property Fund - due to DASS's worsening financial position, EPO agreed to waive the management fee for the 2021 financial year, which meant that a debt EPO owed to DASS was not reduced by the amount of the fee, and remained at about \$19million - on the advice of solicitors, the directors of DASS amended its constitution to authorise DASS's directors to act in the best interests of its parent, EPO, and executed a deed that provided that EPO would only have to pay the \$19million debt if DASS had to make payments in respect of the conflicted advice allegations against it, and only to the extent such payments were not recoverable from insurance - ASIC alleged DASS had been nearing insolvency, and the purpose of the deed was to prevent a voluntary administrator of DASS from calling on the \$19million debt that would otherwise have been available for DASS's creditors - ASIC said Ryan had breached his director's duties under s180, s181(1)(a) and s182 of the *Corporations Act 2001* (Cth) by resolving in favour of the change in the constitution and entry into the deed - ASIC did not allege that Ryan was motivated by, or gained, any personal benefit or advantage, or that DASS's creditors actually suffered any loss - the Court now decided liability - held: in the period of the resolutions, DASS was facing a real and not remote, and increasing, risk of insolvency - the Court declined to find Ryan would have resolved for DASS to enter the deed even if the solicitors had not advised it was in order to do so, or that the solicitors' advice was sought to protect the directors of DASS rather than to inform their decision-making - the Court declined to find the deed was not in the interests of DASS - the solicitors' advice was not materially inaccurate - Ryan relied on the solicitors' advice and would not have resolved to execute the deed if the advice had been that he would be breaching his director's duties by doing so because it was not in the best interests of DASS - Ryan had relied on the advice in good faith and after making an independent assessment, which involved reading the advice carefully and satisfying himself the background assumptions on which it was based were accurate and complete - Ryan's reliance on the advice was reasonable and in good faith and justified his holding the view that the execution of the deed was appropriate and in the best interests of DASS - ASIC had not shown Ryan had breached any directors' duties - proceedings dismissed.

[Australian Securities and Investments Commission](#) (I B)

Hun v Aljazeera International (Malaysia) SDN BHD (No 3) [2024] FCA 1261

Federal Court of Australia

McEvoy J

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Defamation - the applicant was an Australian permanent resident, and a citizen of Cambodia who spends substantial periods of time in Cambodia - the applicant was unable to return to Australia because the Department of Home Affairs has not renewed his visa - the applicant sued Aljazeera International (Malaysia) SDN BHD and other Al Jazeera respondents in defamation, after publication on the Al Jazeera website and on Youtube of a documentary film titled "Forced to scam, Cambodia's Cyber Slaves" - the applicant sought orders that three parts of the respondents' defence be struck out: (1) a justification defence under s25 of the *Defamation Act 2005* (Vic) to an imputation that the applicant was suspected on reasonable grounds by Australian police of drug trafficking; (2) the public interest defence under s29A; and (3) paragraphs concerning mitigation of damages - sought to file an amended defence - held: where the respondents alleged the applicant was complicit in serious criminal, corrupt, and fraudulent conduct involving human slavery, cyber scams, and suspected drug trafficking, the particulars of such allegations had to involve a high degree of precision - there was a conspicuous absence in the respondents' particulars of justification of any allegation about what the applicant actually did, when he did it, or how he knew about any of the matters in which he was said to be complicit - the particulars did not disclose anything capable of establishing that Australian police formed a suspicion that the applicant engaged in drug trafficking and that those facts, viewed objectively, provided a reasonable basis for forming such a suspicion - justification defence struck out - justification defence to other imputations also struck out for the same reason - as for the public interest defence, the court doubted whether the particulars were capable of properly supporting a finding that the respondents reasonably believed the publication of the documentary to be in the public interest - whether the respondents' view was reasonable was not a matter that should be dealt with on a strike out basis - this aspect of the matter was better left to be dealt with at trial in the light of a detailed consideration of the relevant evidence - although the defence raised questions of parliament privilege, the Court considered Parliamentary privilege does not prevent adducing evidence of the fact that something occurred in Parliament - certain paragraphs dealing with mitigation of damages struck out - it was not appropriate to strike out the respondents' plea of "bad general reputation" - the proposed amended defence did not answer the criticisms the Court had made of the justification defence - leave to file amended defence refused.

[Hun](#) (I)

Frank v Angell [2024] NSWCA 264

Court of Appeal of New South Wales

Bell CJ, Gleeson, & Stern JJA

Family provision - Max Willis, a solicitor and former President of the NSW Legislative Council, had long provided financial support to people from the Solomon Islands to gain tertiary qualifications in Australia - the last such people were the appellants, a married couple, and their three children, who were living in Willis's home when he died - he left the couple \$50,000, forgave a debt of about \$80,000, and gave the family a further year's accommodation in his home - he left the rest of his estate to his four adult children - unknown to Willis, the wife of the couple was no longer pursuing her Master of Arts at the time of his death, and she had not

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resumed her studies since - the family lived for a further year at Willis's home - their student visas expired, and they could not obtain alternate visas, and were likely to return to the Solomon Islands - they brought a family provision application, claiming to be eligible persons either as Willis's dependents, or as persons with whom Willis was living in a close personal relationship at the time of his death - the primary judge rejected both alternatives, and also held Willis's provision for the couple had been sufficient in any event, and dismissed the application - the couple appealed - held: the Court had to decide the appellate standard of review of the determination required by s59(1)(b) of the *Succession Act 2006* (NSW), (whether there were factors warranting the making of a family provision application) - the High Court held in *Singer v Berghouse* (1994) 181 CLR 201 that the standard of review of the "jurisdictional question" (whether any provision made for an applicant was inadequate, now required to be determined by s59(1)(c)), was the *House v the King* standard - given the overlap between the question whether there were factors warranting the making of the application and the question whether any provision made for an applicant was inadequate, it would be artificial if the correctness standard applied to one and the *House v The King* standard to the other - there would also be overlap with the clearly discretionary determination under s59(2) as to what provision should be ordered - the *House v The King* standard therefore applies to the determination required by s59(1)(b) - where some testamentary provision has already been made for an applicant, which satisfies the deceased's moral duty, the question under s59(1)(b) is whether the applicant would be generally regarded as a natural object of *further* testamentary recognition - Willis's provision for the appellants had gone further than anything that could possibly have been morally required - appeal dismissed.

[View Decision](#) (B I)

Lamichhane v Plumbcorp Solutions Pty Ltd [2024] NSWSC 1402

Supreme Court of New South Wales

Elkaim AJ

Insurance - the plaintiff was employed by a labour hire company, which provided his services to a plumbing company - the head contractor of building works contracted with the plumbing company to carry out plumbing works at the site - the plaintiff fell into a trench at the site and suffered injuries - he sued the labour hire company, the plumbing company, and the head contractor in negligence - the head contractor and the plumbing company both went into liquidation - the plaintiff sought to join the public liability insurers of the head contractor and plumbing company pursuant to s4 and s5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) - the head contractor's insurer neither consented to nor opposed its joinder, and the plumbing company's insurer opposed its joinder - held: the grant of leave for joinder involved the exercise of a discretion, which could be exercised against the plaintiff even if the plaintiff otherwise satisfied the Court it met the criteria in s4 of the Act - there must be an arguable case against the alleged tortfeasor, which must be unlikely to meet any judgment against it - an insurer may escape joinder if it can show that the policy issued to the alleged tortfeasor would not respond to the claim - the head contractor's insurer had raised no issue that might have influenced the exercise of a discretion in its favour - this insurer should be

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joined - the certificate of insurance issued by the plumbing company's insurer noted that the insurer would not pay for claims where the total contract price at the commencement of all work was \$500,000 or greater - an unsigned statement the director of the plumbing company had given to a private investigator retained by the insurer referred to the plumbing company's fee for its services as the site as being \$542,000 - this statement was annexed to an affidavit of the private investigator - the plaintiff objected to this affidavit on the basis of breach of duty of good faith, as the investigator was engaged to investigate the alleged accident, not the question of insurance cover - the Court admitted the affidavit subject to its weight - the Court gave the affidavit limited weight, as the director's statement was unsigned, the statement was two years old and no other evidence to confirm the contract price had come to light, and the affidavit may well not be admitted at a final hearing due to the lack of good faith objection - due to the limited weight the Court gave the affidavit, it was not persuaded that the insurer had established its policy would not respond to the claim - plumbing company's insurer also should be joined.

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

Gupta v State of South Australia [2024] SASC 126

Supreme Court of South Australia

McIntyre J

Equitable duty of confidence - the applicant was a civil engineer who was referred to a public hospital - a doctor at the hospital diagnosed narcolepsy - the applicant then resigned from his employment - the applicant claimed salary under a group salary continuance insurance policy, which was paid for the maximum period of two years - at some point, it seems the insurer determined to treat the salary continuance claim as a claim for total and permanent disablement - the insurer denied the TPD claim, which was confirmed by the Superannuation Complaints Tribunal - the applicant contended that he had asked the doctor at the hospital to assist him by providing his clinical notes, but the doctor had written a letter to the insurer which contained confidential information relating to the applicant's personal health and medical history that was not in the public domain, which had caused rejection of his TPD claim - the applicant said the doctor disclosed this information without his consent, in breach of an equitable duty of confidence - he brought proceedings against the doctor's employer, the State of South Australia, in the Supreme Court - held: there are four requirements for the existence of an equitable obligation of confidence: (1) the plaintiff must be able to identify with specificity the information in question; (2) the information must have the necessary quality of confidentiality; (3) the information must have been received by the defendant in circumstances importing an obligation of confidence; and (4) there must be actual or threatened misuse of the information without the consent of the plaintiff - the doctor had owed the applicant an equitable duty of confidence regarding information obtained in the context of a doctor and patient relationship - the letter had contained information protected by the equitable duty of confidence - however, in the claim form, the applicant had signed an authority authorising, *inter alia*, any medical practitioner who had attended him to release to the insurer all information regarding his medical history - the claim form had identified the doctor as the applicant's respiratory physician and GP, and had clearly highlighted the doctor's involvement in the applicant's diagnosis and

treatment - that authority was valid and not effectively withdrawn before the doctor wrote to the insurer - the doctor had responded appropriately to the questions he was asked based upon his medical knowledge and treatment of the applicant - there had been no improper disclosure of confidential information - claim dismissed.

[Gupta](#) (B I)

State of Tasmania v Cane [2024] TASSC 56

Supreme Court of Tasmania

Brett J

Workers compensation - the respondent was employed by the State of as a correctional officer - he made a claim for compensation for an injury to his right knee that occurred when he was putting a box down - the respondent later made a claim for severe anxiety and depression resulting from the knee injury - the State then served a notice under s81 of the *Workers Rehabilitation and Compensation Act 1988* (Tas) disputing liability to pay compensation, on the basis that the injury with respect to which the claim was made was not one for which compensation was payable because it was a an illness or disorder of the mind which had arisen substantially from reasonable action taken by the employer under the Act in a reasonable manner or reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment, pursuant to s25(1A) of the Act - the State referred the matter to the Tasmanian Civil and Administrative Tribunal under s81A, which held it did not have jurisdiction because the claim was in respect of an injury for which the respondent had previously made a claim for compensation, and therefore was not a claim to which s81A applied - the Tribunal found that, if it did have jurisdiction, it would have rejected the State's referral as there was no reasonably arguable case concerning the liability of the State to pay compensation pursuant to the claim - the State appealed to the Supreme Court on questions of law - held: the State's argument that the Tribunal erred by finding that the claim for psychological injury was in respect of the injury to the respondent's knee was flawed - that argument focused on conclusions available from the objective evidence about the causal connection, and did not address the correct question under s80A, which was as to the nature of the claim, not its objective validity - that argument also misapplied the required connection between the claim and the injury, in particular of the requirement that the claim must be 'in respect of an injury' - the Tribunal had arrived at the correct conclusion, having regard to the undisputed evidence - the basis of the claim was that the respondent was suffering from psychological symptoms which had arisen from the physical injury - the Tribunal had therefore correctly decided it had no jurisdiction - appeal dismissed.

[State of Tasmania](#) (I B)

Poem for Friday

In this short Life that only lasts an hour (1292)

By Emily Dickinson (1830-1886)

In this short Life that only lasts an hour
How much - how little - is within our power

Emily Dickinson, American poet, was born on 10 December 1830 in Massachusetts. She was the daughter of a lawyer, later a US representative, who was the treasurer of Amherst College, founded by her grandfather, and the school which Dickinson attended, after her early years at Amherst Academy. She lived with her sister for many years. From her 20s she restricted social interaction, becoming a recluse in her later years. She was a prodigious writer of letters and poetry. Only 10 of her poems was published during her life time. The first edition of her poetry was published 4 years after she died, in 1890. It received great success, with 11 editions published over the next two years. Emily Dickinson died on 15 May 1886.

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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