AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 10 November 2023

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

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (HCA) - s189(1) and s196(1) of the *Migration Act 1958* (Cth) are beyond the legislative power of the Commonwealth to the extent they purport to authorise indefinite detention (I B)

Tonakie v Director of Professional Services Review (FCA) - reference of review of services under the *Health Insurance Act 1973* (Cth) to a Professional Services Review Committee stopped time running against the Director to finalise the review, even though that reference was later set aside (I B)

Black Head Bowling Club Ltd v Harrower (NSWCA) - Bowling Club and stonemason both liable in negligence after an ANZAC monument fell and killed a young girl (I)

Bondi Beach Foods Pty Ltd v Chadwick (NSWCA) - primary judge had erred in finding owner/occupier of bar and security firm negligent regarding an assault on a bar patron on the basis that the assailant's group should have been asked to leave, but not in finding negligence on the basis that not enough licenced security guards were engaged (I B)

Potts v Potts (NSWSC) - three siblings held a property on trust for another sibling who had provided the entire purchase price for the property (I B)

HABEAS CANEM

Waiting with intent

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Summaries With Link (Five Minute Read)

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor [2023] HCATrans 154
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ
Constitutional law - the applicant arrived in Australia as an unauthorised maritime arrival - he was held in immigration detention until 2013 until granted a bridging visa while he applied for a protection visa - while on the bridging visa, he sexually assaulted a young boy who was known to him, and was convicted of sexual intercourse with a person aged between 10 and 14 years - a delegate of the Minister refused to issue the protection visa, the administrative Appeals Tribunal affirmed this decision, and the Federal Court dismissed an application for judicial review - in these circumstances, s189(1) and s196(1) of the *Migration Act 1958* (Cth) required the applicant to be held in immigration detention - the applicant was stateless, and there was no real prospect of his removal from Australia in the reasonably foreseeable future - the High Court held that s189(1) and s196(1) of the *Migration Act 1958* (Cth) do purport to authorise such detention, but are beyond the legislative power of the Commonwealth in that respect, and that the applicant's detention is unlawful - writ of habeas corpus granted - (the High Court has made orders but not yet published reasons, and a further summary will be published after the publication of reasons).
NZYQ Part 1
NZYQ Part 2 (I B)

Tonakie v Director of Professional Services Review [2023] FCA 1365
Federal Court of Australia
Stewart J
Administrative law - the applicant is a medical practitioner specialising in diagnostic radiology and nuclear medicine - the Director decided to review the applicant's provision of CT and PET services as potentially inappropriate practice - s94(1) of the *Health Insurance Act 1973* (Cth) provides that, if the Director decides to review the provision of services by a person, and the Director does not, within 12 months, make a decision to take no further action, or enter into a an agreement with the person under s92, or refer the review to a Professional Services Review Committee, the Director is taken to have made a decision at the end of the 12 month period to take no further action in relation to the review - within the 12 month period, the Director decided to set up a Committee and to refer the review to that Committee - the Federal Court set aside by these decisions by consent, after the Commonwealth accepted that the Director had not complied with s95(4) and s93 - although the 12 month period had now expired under s94(1), the Commonwealth would not consent to a declaration that the Director was taken to have made a decision under s94(1) to take no further action, and the applicant did not press for such relief - the Director then made new decisions to set up a Committee and refer the review to it - the applicant sought to quash these decisions, and sought a declaration that the Director was taken to have made a decision under s94(1) to take no further action - held: this case demanded an

answer to the metaphysical question whether conduct that is a legal nullity can nevertheless have legal consequences - more specifically, the question was whether the first purported referral to the purported Committee, although, set aside by the Court, was nevertheless a referral in fact sufficient to stop time running under s94(1) - there are circumstances in which a decision that is jurisdictionally flawed is regarded, in law, as no decision at all - however, there are other circumstances where a jurisdictionally flawed decision is regarded as a decision in fact such as to amount to a "decision" referred to in legislation and thus giving rise to legal consequences - whether a statutory reference to a decision is a reference only to a valid decision, or whether it is a reference to a decision in fact, is a question of construction of the provision in question - a previous decision of the Federal Court had held that, even if a referral has been set aside, the fact of the referral was sufficient to stop time running against the Director under s94(1) - this decision was neither distinguishable nor clearly wrong (and the Court in fact agreed with it) - the proceedings should therefore be dismissed on the merits - the Commonwealth's alternative grounds (Anshun estoppel and abuse of process) would have failed, as the relevant conversation between the parties' solicitors when agreeing to the consent orders setting aside the first decisions had anticipated the s94(1) question being dealt with in a subsequent proceeding if the Director made a new referral - application dismissed.
Tonakie (I B)

Black Head Bowling Club Ltd v Harrower [2023] NSWCA 267
Court of Appeal of New South Wales
Payne & Adamson JJA, & Simpson AJA
Negligence - a three year old girl was killed when an ANZAC memorial headstone in the grounds of the Black Head Bowling Club became dislodged from its base and fell on her - at the time, a 10-year old boy was riding the monument as if it were a horse, thereby creating lateral forces which were the immediate cause of the dislodgment - the underlying cause of the collapse was that the monument had been poorly constructed in 1997 - the girl's family members sued the Club, the stonemason who had constructed and installed the monument; and the insurer of the stonemason's company (which had been deregistered - the Club cross-claimed against the stonemason and the insurer - the primary judge found that the Club was liable in negligence and ordered judgment against it in favour of the plaintiffs - the primary judge also found that the stonemason was negligent but that the scope of his liability ought not extend to the harm caused and therefore ordered judgment in favour of the stonemason on the plaintiffs' claim and the Club's cross-claim - the primary judge also found that the insurer's policy did not cover the liability, as the date of the girl's death was not within the period of insurance - the Club was ordered to pay all other parties' costs - the Club appealed, and the girl's family members cross-appealed in respect of the judgment for the stonemason - held (by majority, Adamson JA dissenting): having regard to s5B of the *Civil Liability Act 2002* (NSW), it was foreseeable that the headstone might detach from its base and cause injury to any children allowed to play in the vicinity - It was neither far-fetched nor fanciful that the headstone might detach and fall on a child playing near it - the risk of harm was not insignificant - a reasonable person in the Club's position would have retained an engineer at the outset to assess and certify

the stability and integrity of the proposed method of installation of the monument - the opinion of a stonemason or an engineer about whether a reasonable person, in the position of the Club, would have taken this precaution was irrelevant - had the Club engaged an engineer at the outset, the evidence was clear that the fatal defect in the construction of the monument would have been discovered - causation under s5D of the *Civil Liability Act* was therefore established - however, the primary judge had erred in finding the Club negligent on the further basis that it failed to conduct a "simple push test" immediately after construction and again 10 years later - this was not a precaution a reasonable person would have taken in the circumstances, and the informality of the test, on the evidence, highlighted the uncertainty about its content and operation, as it was apparently a spot assessment conducted by a lay person - held (by the whole Court): the primary judge had erred regarding the scope of liability of the stonemason - he was a qualified and experienced stonemason who had installed a structure which by its nature, could be expected to remain in place for many years and which would, if properly constructed, have been expected to last without maintenance for over a century - where a stonemason designs and installs a structure and does so negligently, it is appropriate that the stonemason's liability extend to the harm caused - appeal by the Club and the cross-appeal by girl's parents against the stonemason allowed, but the Club's appeal otherwise dismissed.
View Decision (I)

Bondi Beach Foods Pty Ltd v Chadwick [2023] NSWCA 265
Court of Appeal of New South Wales
Gleeson, Leeming, & Payne JA
Negligence - the plaintiff attended a bar at Bondi - another patron viciously assaulted the plaintiff, including after he became unconscious - plaintiff suffered physical, psychiatric, and psychological impairments - he sued the owner/occupier of the bar and the company retained to provide security services at the bar in negligence - the primary judge found for the plaintiff, with contributory negligence of 20%, and awarded total damages of just over $200,000 awarded (see Benchmark 22 March 2023) - the owner/occupier and the security firm appealed - held: the primary judge had held Chadwick entitled to succeed by two separate routes: (1) the assailant and his group would, but for the breaches of duty by both defendants, have been removed from the premises well in advance of Chadwick's arrival; and (2) if there had been sufficient licensed security guards present in the seconds preceding the altercation, then they should have intervened to de-escalate the situation, and more likely than not they would have done so, with the result that Chadwick would not have been injured - regarding the first route to liability, the primary judge had not erred in identifying the risk of harm as the risk of physical injury from an intoxicated person, rather than the risk of physical injury from patrons who were objectively manifesting signs of intoxication or anti-social behaviour - the duty applied by the primary judge reflected the defendants' submissions at trial, and accorded with the authorities - however, it had not been established that the assailant's group had shown signs of intoxication or violence before Chadwick's arrival - even if some members of that group manifested signs which warranted further investigation, notably, the "stumbling man", it would have been reasonable for security to take steps short of asking that member to leave - the primary judge had therefore

erred in holding the appellants liable under the first route to liability - the primary judge had not erred in finding the appellants liable via the second route - none of the security company's employees were licensed security guards, and at least two should have been, in light of the venue's history of violence and intoxication, in circumstances where it had not been shown that the licensee or manager was trained and prepared to intervene physically in the event it was necessary to do so - the primary judge's finding of 20% contributory negligence should be set aside and replaced with a finding of 50% - Chadwick twice escalated the situation, by striking the first blow, and then, after Responsible Service of Alcohol marshals had sought to separate people, attempting what appeared to be a punch rather than a shove - the primary judge had not complied with s13 of the *Civil Liability Act 2002* (NSW) in awarding a buffer of $25,000 for future economic loss - although it is possible to award damages for future economic loss by way of a buffer where it is difficult or impossible to be more precise, this does not obviate the need to comply with s13 by being satisfied as to the assumptions about future earning capacity or other events on which an award for future economic loss is based, to adjust the amount awarded by the percentage possibility that the relevant events might have occurred but for the injury, and to state those assumptions and that percentage - the primary judge had not erred in determining that each appellant was equally liable to Chadwick - appeals allowed in part, and damages reduced to about $113,000.
View Decision (I B)

Potts v Potts [2023] NSWSC 1344
Supreme Court of New South Wales
Elkaim AJ
Real property - a father died in 2007, leaving a farming property to his four children in equal shares - the children continued the farming enterprise, and then sold the property in 2014 - the father's sister died in 2011, and left her estate worth just over $1million to two of the children, (Susan and Janette) - the children agreed that this estate should be divided equally between them - one quarter was paid to Susan, Janette, and a third sister, Rowena - the three sisters caused the quarter share that was to go to their brother David into a trust account, to protect it from dissipation by David in furtherance of a gambling addiction - in 2013, the siblings purchased a property in Fernbank Creek, a suburb of Port Macquarie - the three sisters became the registered proprietors - the purchase price was supplied from David's trust account, and from a loan which was entirely repaid by David - after the relationship between the siblings broke down around 2021, David and Susan commenced proceedings against Janette and Rowena, contending that David was the equitable owner of the property - David and Susan contended that David's share was given to him without qualification, subject only to being held on trust for him, for his protection - Janette and Rowena contended that David's share was not unqualified, but remained as the property of the three sisters to be used for David's benefit as long as he was alive - held: the Court was satisfied that the creation of a trust account for David's share and the purchase of the property in the names of the sisters were devices intended to protect David from his gambling habits - they were not intended to, and did not reflect, any beneficial ownership of these assets - David has, either through direct payment or

through repayment of loans, paid all monies associated with the purchase, maintenance, and upkeep of the property - relevant presumptions of equity were (1) where a person pays the purchase price of property and causes it to be transferred to another or to another and himself jointly, the property is presumed to be held by the transferees on trust for the person who provided the purchase money; (2) where two or more persons advance the purchase price of property in different shares, it is presumed that the persons to whom the legal title is transferred hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it - the Court declared that the three sisters held the property on trust for David - David should indemnify his sisters in respect of any amount owing under any loan facility in their names and for any amount which might be payable by way of capital gains tax if the property is sold.
View Decision (I B)

Poem for Friday

Renouncement

By: Alice Meynell (1847-1922)

I must not think of thee; and, tired yet strong,
I shun the thought that lurks in all delight—
  The thought of thee—and in the blue heaven's height,
And in the sweetest passage of a song.
Oh, just beyond the fairest thoughts that throng
  This breast, the thought of thee waits hidden yet bright;
But it must never, never come in sight;
I must stop short of thee the whole day long.
But when sleep comes to close each difficult day,
  When night gives pause to the long watch I keep,
And all my bonds I needs must loose apart,
Must doff my will as raiment laid away,—
  With the first dream that comes with the first sleep
I run, I run, I am gathered to thy heart.

Alice Christiana Gertrude Meynell was born on 11 October 1847 in Barnes, London. The family lived mainly in Italy. Charles Dickens was a friend of her father. Alice married Wilfrid Meynell and had eight children, including Francis who became a poet and viola who was a writer. She was a British suffragist and poet, who also worked as an editor and a critic. Alice Meynell was frequently ill throughout her life. Her work was published in The Spectator, the Scots Observer, and the Saturday Review. She died on 27 November 1922 in London. She was twice considered for Poet Laureate of the UK. Elizabeth Barrett Browning was her third cousin.

Click Here to access our Benchmark Search Engine