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Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Morocz v Marshman (NSWCA) - medical negligence - no inadequacy of warnings of consequences of medical procedure - appeal dismissed (I B C G)

Mansfield v Great Lakes Council (NSWCA) - negligence - appellant injured when driving a tipper truck when side of track gave way and truck rolled into water course - Council not liable - appeal dismissed (I B C G)

Patrick Stevedores Operations (No 2) Pty Ltd v Port of Melbourne Corporation (No 2) (VSC) - discovery - client legal privilege - issue waiver - relevant state of mind - application for discovery and inspection of advice refused (I B C G)

Credit Union Australia Ltd v Parkhouse (VSC) - summary judgment - possession - default on two mortgages - necessity to plead failure to remedy default - no prospects of successful defence - summary judgment granted (I B C G)

Kitanovski v Melton City Council (VSC) - environment and planning - judicial review - convictions under *Planning and Environment Act 1987* (VSC) - application for review of County Court judgment dismissed (I B C G)

Mercedes-Benz Australia/Pacific Pty Ltd v Commissioner of State Revenue (VSCA) - taxation - imposition of duty in respect of two cars - primary purpose - no error of law

established - appeal dismissed (I B C G)

Australian Reliance Group Pty Ltd v Coverforce Insurance Brokers Victoria Pty Ltd (WASC) - cross-vesting - competing jurisdictions equally appropriate - application to transfer proceedings from Western Australia to Victoria refused (I B C G)

Summaries With Link (Five Minute Read)

Morocz v Marshman [2016] NSWCA 202

Court of Appeal of New South Wales

Macfarlan & Payne JJA; Emmett AJA

Medical negligence - appeal concerned appellant's claim that respondent did not adequately warn her of possible consequences of a medical procedure - primary judge dismissed claim, finding that respondent warned appellant on all matter which experts indicated she should have been warned about and that she underwent procedure in knowledge of those matters - appellant appealed - admissibility of reports - whether erroneous findings that warnings were adequate - whether proper identification of material risks which appellant should have been warned about - factual causation - whether miscarriage of justice - trespass - ss50 & 5P *Civil Liability Act 2002* (NSW) - ss76 & 79 *Evidence Act 1995* (NSW) - s75A *Supreme Court Act 1970* (NSW) - held: tender of further evidence refused - grounds of appeal failed - appeal dismissed.
[Morocz](#) (I B C G)

Mansfield v Great Lakes Council [2016] NSWCA 204

Court of Appeal of New South Wales

Beazley P; Basten & Leeming JJA

Negligence - appellant injured when driving a tipper truck when side of track gave way and truck rolled into water course - appellant sued council in negligence - trial judge upheld respondent's claim of immunity on basis of absence of 'actual knowledge of the particular risk the materialisation of which resulted in the harm' pursuant to s45 *Civil Liability Act 2002* (NSW) - trial judge ultimately dismissed appellant's claims - ss5B, 40, 43A, 45 *Civil Liability Act 2002* - s71 *Roads Act 1993* (NSW) - s50 *Road Transport (Safety and Traffic Management) Act 1999* (NSW) - Pt 6 *Transport Administration Act 1988* (NSW) - application of s43A(3) *Civil Liability Act* - whether immunity under s45 *Civil Liability Act* was engaged - whether appropriate signage could have prevented harm - held: no error requiring Court to overturn findings on liability - appeal dismissed.

[Mansfield](#) (I B C G)

Patrick Stevedores Operations (No 2) Pty Ltd v Port of Melbourne Corporation (No 2) [2016] VSC 467

Supreme Court of Victoria

Derham AsJ

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Discovery - plaintiff sought discovery or production of written advice which defendant received from its lawyers concerning renewal of two leases and a licence - defendant objected on basis of relevance and client legal privilege - whether 'issue waiver' of privileged communications - relevant state of mind - ss122 & 133 *Evidence Act 2008* (Vic) - held: Court not satisfied defendant acted in manner inconsistent with maintaining privilege in advice - it was not a case where defendant making assertions as to its state of mind where confidential communications were likely to have affected state of mind - application refused.

[Patrick Stevedores](#) (I B C G)

Credit Union Australia Ltd v Parkhouse [2016] VSC 462

Supreme Court of Victoria

Lansdowne AsJ

Summary judgment - possession - plaintiff sought summary judgment for possession of land due to default under two mortgages - Court withdrew grant of summary judgment prior to authentication on basis it was necessary for plaintiff to plead failure to remedy default - necessity for plaintiff to plead failure to remedy default had not been explored at hearing - held: Court satisfied plaintiff has proved its case for summary judgment - no real prospect of success in defence - summary judgment granted - adjournment refused.

[Credit Union Australia](#) (I B C G)

Kitanovski v Melton City Council [2016] VSC 474

Supreme Court of Victoria

Keogh J

Administrative law - plaintiff charged by first defendant's planning enforcement officer with offences under *Planning and Environment Act 1987* (VSC) - plaintiff's appeal against conviction on certain charges dismissed - plaintiff sought orders quashing convictions and dismissing charges - whether lack of procedural fairness - whether separate charges against plaintiff's brother should be dismissed - whether erroneous construction of *Planning and Environment Act 1987* (Vic) - held: procedural fairness afforded to plaintiff - plaintiff conceded he could not proceed concerning charges against brother - challenges to validity of charges failed - application for review dismissed.

[Kitanovski](#) (I B C G)

Mercedes-Benz Australia/Pacific Pty Ltd v Commissioner of State Revenue [2016] VSCA 194

Court of Appeal of Victoria

Tate, Beach & Ferguson JJA

Taxation - Commissioner of State Revenue disallowed applicant's objection to duty on two cars under *Duties Act 2000* (Vic) - applicant provided the cars to customers whose vehicles were being serviced - cars were then sold - Commissioner found cars not primarily used for purpose of sale or as demonstrator vehicle - Victorian Civil and Administrative Tribunal confirmed Commissioner's determination - applicant sought to appeal under s148(1)(a) *Victorian Civil and*

Administrative Tribunal Act 1998 (Vic) - held: applicant failed to demonstrate any error of law - appeal dismissed.

[Mercedes-Benz](#) (I B C G)

Australian Reliance Group Pty Ltd v Coverforce Insurance Brokers Victoria Pty Ltd [2016] WASC 244

Supreme Court of Western Australia

Banks-Smith J

Cross-vesting - corporations - plaintiff commenced proceedings against first to fourth defendants seeking injunction restraining first and second defendants from registering any transfer of shares plaintiff held in first defendant to second defendant or any re-transfer by second defendant, or sought reinstatement of shares - five defendants sought transfer of proceedings to Supreme Court of Victoria pursuant to s1337H *Corporations Act 2001* (Cth) - held: competing jurisdictions were equally appropriate - it was 'a matter of impression' - appropriate to leave proceedings in Western Australia - application dismissed.

[Australian Reliance Group](#) (I B C G)

CRIMINAL

Executive Summary

R v Saeed (SCC) - criminal law - search & seizure - forensic sample - swab taken of appellant's penis on arrest without court order or warrant - appellant accused of sexual assault - police formed view that penile swab necessary to locate & preserve complainant's DNA - whether appellant's protection from unreasonable search & seizure (s8 *Canadian Charter of Rights and Freedoms*) violated-taking of forensic sample authorized as incidental to common law power of arrest-appeal dismissed

Willis v The Queen (VSCA) - criminal law - police questioning - necessity to be advised of rights - necessity to record information given to suspects - ss464A, 464G *Crimes Act 1958* (Vic) - murder appeal - issue the admissibility of a Record of Interview and a statement made by the applicant - application of s138 *Evidence Act 2008* - nature of appeal challenging findings on *voir dire* - desirability of using PEACE method of questioning suspects considered - leave to appeal refused

Summaries With Link

R v Saeed [2016] SCC 24

Supreme Court of Canada

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McLachlin CJ, Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Cote, Brown JJ
Criminal law-search & seizure - forensic sample taken by arresting officer without court order or warrant - right to be secure from unreasonable search or seizure (s8 *Canadian Charter of Rights & Freedoms*) - appellant arrested shortly after complainant sexually assaulted - arresting officer advised that assault was penile vaginal and formed view that complainant's DNA would be found on appellant's penis - appellant handcuffed to wall in a dry cell for about 40 minutes and was then advised that the police required a swab of his penis - appellant was permitted to take the swab under police observation - complainant's DNA identified on swab - issue at trial was the identity of complainant's attacker - trial judge ruled the taking of the swab violated appellant's s8 rights, but admitted the evidence under s24 (evidence obtained in violation of Charter rights excluded if its admission would bring the administration of justice into disrepute) - appellant was convicted and appealed - held: the common law power of arrest authorizes the taking of a penile swab if the arresting officer has reasonable grounds to believe that the procedure will locate and preserve evidence of the offence for which the accused was arrested - whether there is a reasonable belief will depend upon the timing of the arrest relevant to the alleged incident and the possibility that the DNA has been destroyed or lost - the swab must be taken in a reasonable manner - here the appellant was validly arrested and the police had reasonable grounds to believe that the complainant's DNA had transferred to his penis during the assault and that it would be located by a penile swab - the accused took the swab himself and his s8 rights were not fundamentally violated - appeal dismissed.[Editor's note: Karakatsanis J concurred in the result, finding that the appellant's s8 rights were violated, but that the evidence was admissible under s24 (cf s138 *Evidence Act 1995* (Cth)); Abella J dissented - the appellant's s8 rights were violated and s24 was inapplicable, judicial authorization being required to permit invasive searches to obtain body samples and the deliberate decision by the police not to seek a warrant was fatal to the admission of the evidence .

[Saeed](#)

Willis v The Queen [2016] VSCA 176

Court of Appeal Victoria

Weinberg, Priest & Beach JJA

Criminal law - police questioning-necessity to be advised of rights - necessity to record information given to suspects - ss464A, 464G *Crimes Act 1958* (Vic) - application for leave to appeal conviction for murder - sentenced to 24 years, NPP 20 years - issue at trial was the admissibility of a Record of Interview and later statement made by the applicant - on *voir dire*, interviewing officer alleged that he had partially advised applicant of his rights, but admitted that no record of that advice was made (the s464 G breach) - interviewing officer had adopted the informal interviewing methodology identified as PEACE - applicant further alleged interviewing officer failed to advise him of his right to silence and of the circumstances of the alleged offence (the s464A breach) - relevance of s138 *Evidence Act 2008* (VIC) considered - trial judge found police officer acted inadvertently and admitted the Interview and the statement-applicant appealed and raised the competency of counsel - nature of an appeal challenging findings on

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voir dire considered - authorities referred to - held: this court will not conclude that a trial judge who has conducted a *voir dire* has made a factual error of a vitiating kind unless satisfied that the finding was not reasonably open (see *Attorney-General (NSW) v Jackson* (1906) 3 CLR 730; *R v Kyriakou* (1987) 29 A Crim R 50) - in seeking the exclusion of the contested material, the onus is on the applicant to establish that it was improperly or illegally obtained - once that onus is discharged the Crown must satisfy the court that the desirability of admitting it outweighs the undesirability of doing so, having regard to the way it was obtained - the applicant bore the onus of establishing that he was neither told why he was in custody or cautioned - it was sufficient that the applicant was aware he was under arrest, in custody and was being questioned about the deceased's disappearance (*R v Lancaster* [1998] 4 VR 550) - there was no breach of s464A(2)(a) - s464G serves an importance purpose but an inadvertent breach in a case of murder does not warrant the exclusion of evidence under s138 - an appellant court will only intervene where flagrant incompetence of counsel has led to a miscarriage of justice (*TKWJ v The Queen* (2002) 212 CLR 124; *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1; *Nudd v the Queen* 225 ALR 161) - here there was no miscarriage of justice-leave to appeal refused.[Editor's note - PEACE stands for "preparation", "engage and explain", "account", "challenge or clarification". The Court questioned whether the PEACE method of questioning should continue to be followed in Victoria].

[Willis](#)



A Man Said to the Universe

BY [STEPHEN CRANE](#)

A man said to the universe:

“Sir, I exist!”

“However,” replied the universe,

“The fact has not created in me

A sense of obligation.”

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