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Friday, 14 July 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)

Anderson v State of NSW; Perri v State of NSW (NSWCA) - strip search by police did not constitute child abuse for the purposes of s6A of the *Limitation Act 1969* (NSW), and the applicants' causes of action were therefore time barred (I)

The Next Generation (NSW) Pty Ltd v State of New South Wales (NSWCA) - appellant failed to show that Pt 4 of Ch 9 of the *Protection of the Environment Operations (General) Regulation 2022* (NSW) (dealing with energy recovery from the thermal treatment of waste) made under the *Protection of the Environment Operations Act 1997* (NSW) was invalid and of no effect (I B C)

Blue OP Partner Pty Ltd v De Roma (NSWCA) - plaintiff's claim failed as the risk of tripping on a utility pit lid was an obvious risk (I)

Grain Technology Australia Ltd v Rosewood Research Pty Ltd (No 4) (NSWSC) - deed of settlement assumed assets were held on charitable trust - Court held they were not - no implied term requiring assets to be dealt with as if they were held on charitable trust in such circumstances (I B)

Gianchino v Gianchino (VSCA) - adverse possessory title established where a husband had moved interstate and the wife had changed the locks (I B C)

HABEAS CANEM

McGregor as a sleeping puppy

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Summaries With Link (Five Minute Read)

Anderson v State of NSW; Perri v State of NSW [2023] NSWCA 160
Court of Appeal of New South Wales
Gleeson & White JJA, & Griffiths AJA
Limitation of actions - when the applicants were 13 and 14, they were with a group of boys on the grounds of the University of New South Wales when another boy in their group grabbed a mobile phone from a woman and ran off with it - all the boys were arrested, but the stolen mobile phone could not be found during a pat down search - both applicants were taken to a Police Station and strip searched - both applicants were released without charge after being detained for more than three hours - more than ten years later, both applicants commenced proceedings for false imprisonment, assault, and battery - the State did not seek to argue that the relevant police actions were not tortious, but relied on a limitations defence - s6A of the *Limitation Act 1969* (NSW) provides that no limitation applies for an act or omission that constitutes child abuse - the primary judge held that the arrest, pat down search, and strip search were all tortious, but that the actions did not constitute child abuse, and that the limitation defence therefore succeeded - had the limitation defence not succeeded, each applicant would have been awarded damages for false imprisonment of $20,000 and damages for the assault constituted by the strip search of $20,000 - the applicants sought leave to appeal, which was required because the amount in issue was less than $100,000 - held: child abuse in s6A is defined as sexual abuse, serious physical abuse, or any other abuse perpetrated in connection with sexual abuse or serious physical abuse - on its proper construction, the reference to "sexual abuse" as part of this definition means conduct which has a sexual connotation - whether or not conduct has a sexual connotation so as to constitute "sexual abuse", is essentially a question of fact - whether or not the strip searches carried out here involved a sexual connotation was the very matter which the primary judge addressed and determined - the primary judge's reasons were consistent with an objective assessment having been applied to the events which occurred, and no arguable error of law or fact had been demonstrated - this was not an appropriate case in which to grant leave to appeal in circumstances where the applicants' complaints relating to the primary judge's rejection of their claims was fundamentally an unconvincing complaint about fact finding - no issue of general principle or general public importance was raised and no substantial injustice was identified - as to the date of discoverability of the causes of action, s50F(3) of the *Limitation Act* provides that facts that are known or ought to be known by a capable parent or guardian of the minor are taken to be the facts that are known or ought to be known by the minor - there was no error in the primary judge's findings that the capable person in respect of each applicant knew or ought to have known facts such that the causes of action were discoverable more than three years before the institution of proceedings - leave to appeal refused.
View Decision (I)

The Next Generation (NSW) Pty Ltd v State of New South Wales [2023] NSWCA 159
Court of Appeal of New South Wales

Meagher, Gleeson, & Beech-Jones JJA
Environment and planning - Next Generation lodged a State significant development application under the *Environmental Planning and Assessment Act 1979* (NSW) seeking development consent for the construction and operation of an energy from waste facility on land in Eastern Creek - the Independent Planning Commission refused the application - Next Generation filed Class 1 proceedings in the Land and Environment Court appealing this refusal - Next Generation later commenced separate Class 4 proceedings in the Land and Environment Court seeking a declaration that Pt 4 of Ch 9 of the *Protection of the Environment Operations (General) Regulation 2022* (NSW) (dealing with energy recovery from the thermal treatment of waste) made under the *Protection of the Environment Operations Act 1997* (NSW) is invalid and of no effect - the primary judge dismissed the Class 4 proceedings - Next Generation appealed - held: s323 of the *Protection of the Environment Operations Act* provides that the Governor may make regulations, not inconsistent with the Act, for or with respect to any matter that by the Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the Act - such a power does not enable the authority by regulations to extend the scope or general operation of the Act but is strictly ancillary - the ambit of the regulation-making power must be ascertained by the character of the Act and the nature of its provisions - an important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned - the reference to "intention" here poses the question whether the statute deals completely and thus exclusively with the subject matter of the regulation with the consequence that the regulation detracts from or impairs that operation of the statute - the provisions of the *Protection of the Environment Operations Act*, including the scope of the regulation-making power, confirm that the regulations were not inconsistent with the scheme for granting licences under Ch 3 of the Act, even though those regulations might prohibit an activity the subject of such a licence - the regulations were inconsistent with s4.42(1)(e) of the *Environmental Planning and Assessment Act* - there was no basis for construing the regulation-making power to authorise the making of a regulation that is inconsistent with the provisions of another Act - s32 of the *Interpretation Act 1987* (NSW) allowed the regulations to be read down so that their operation was not inconsistent with the provisions of the *Environmental Planning and Assessment Act* - declaratory relief not given as Class 1 proceedings were still on foot - appeal dismissed.
View Decision (I B C)

Blue OP Partner Pty Ltd v De Roma [2023] NSWCA 161
Court of Appeal of New South Wales
Meagher, Mitchelmore, & Kirk JJA
Negligence - De Roma was injured when she tripped and fell whilst walking over a steel checkerplate utility pit lid and pit frame set in a concrete footpath surface on Parramatta Road, Ashfield - Ausgrid was responsible for the inspection, maintenance, and safety of the utility pit, which provided access to its electrical network infrastructure - the primary judge held that Ausgrid had breached its duty as occupier of the utility pit in failing to provide any warning of there being height differences of up to 1cm between the level of the pit lid and the top edge of

its slightly higher surrounding metal frame - the primary judge found contributory negligence of 20% - the primary judge assessed damages after contributory negligence of just over $280,000 - Ausgrid appealed against the finding of liability - held: Ausgrid had a duty to exercise reasonable care to see that the part of the footpath in which its utility pit was located was safe for users exercising reasonable care for their own safety - s5H of the *Civil Liability Act 2002* (NSW) provides that a person does not owe a duty of care to warn of an obvious risk - s5F defines an obvious risk as a risk that, in the circumstances, would have been obvious to a reasonable person - the obviousness of a risk of harm may depend on the level of generality or particularity with which the risk is described - the correct approach to the characterisation of the risk of harm in the application of the obvious risk provisions is that the risk said to be an obvious risk should be characterised at the same level of generality as the risk is characterised in the course of assessing whether the defendant has breached a duty of care, and should include the same facts as established the risk for the purposes of the breach of duty which caused the harm to the plaintiff, but no more - the characterisation of the risk does not need to descend to the precise detail of the mechanism by which an injury was suffered if that detail is unnecessary to establish a breach of duty - the relevant question posed by s5F was not whether it was obvious that there was a risk that De Roma would trip in the way that she did; rather, it was whether it was obvious that a risk of that kind might be present and materialise as she walked across the footpath containing the utility pit lid and frame - the primary judge's obvious risk analysis does not address that risk of harm from the perspective of a reasonable person in the respondent's position - walking on and over the utility pit lid and frame in the concrete footpath carried with it a risk of tripping and falling because of an uneven surface or surfaces - that was sufficient to satisfy the definition of obvious risk in relation to the risk that materialised, and to engage the application of s 5H - appeal allowed and De Roma's claim dismissed.
View Decision (I)

Grain Technology Australia Ltd v Rosewood Research Pty Ltd (No 4) [2023] NSWSC 822
Supreme Court of New South Wales
Palmer J
Contracts - parties in litigation settled the proceedings by a deed of settlement and release, which provided for the compromise of certain claims between the parties, subject to Court approval, and that the parties would apply to the Court for declarations and consequential orders in the exercise of the Court's jurisdiction over charitable trusts, which would apply to the assets held by the defendants - all of the parties agreed among themselves that the assets in question were held by the BRI Companies on charitable trust - however, in its judgment, the Court decided to the contrary - as a result of that judgment, all of the remaining substantive claims for relief, as formulated in the parties' pleadings, were dismissed or withdrawn - the plaintiffs contended, on the true construction of the Deed, that the parties were now obliged to conduct a "restructure" of the defendant companies, which would result in those companies' assets being dealt with as if those assets were held on charitable trust - the plaintiffs brought an application to this effect, invoking the Court's power under s73 of the *Civil Procedure Act 2005* (NSW) to determine the terms on which proceedings have been compromised or settled

between parties, and to make orders giving effect to any such determination - held: the parties had approached the present application as a question of construction - as the Deed was a commercial agreement, the Court had to decide what a reasonable businessperson would have understood the Deed's terms to mean - the Deed contemplated the possibility that the Court would refuse to make the agreed declaratory orders - the plaintiffs had to show there were implied terms by which the parties had agreed to some specified restructure - they had not done so - the Deed simply did not address, expressly or by implication, what was to happen if the Court were to conclude that the defendants' assets were not held on charitable trust - application dismissed.
View Decision (I B)

Gianchino v Gianchino [2023] VSCA 162
Court of Appeal of Victoria
Beach, T Forrest, & Osborn JJA
Adverse possession - in 1983, Angelo and Susan Gianchino purchased land containing a detached house in Mont Albert - in 2004, Angelo moved to Queensland leaving Susan and their two children residing on the land - a few weeks later, Susan told Angelo that she and the children would not be following him to Queensland, and the couple separated although they never formally divorced - in 2004, Susan changed the locks to the house in order to exclude Angelo from the land - Angelo continued making mortgage payments on the land up to 2008, which he agreed were by way of maintenance contributions - Susan died in 2019, and the two children became executors of her estate - Angelo become registered as the sole registered proprietor by right of survivorship - the children refused to vacate the land, and filed a writ claiming possessory title over the whole of the land, relying on s14(4), or alternatively s14(1), of the *Limitation of Actions Act 1958* (Vic) - Angelo filed a counterclaim in which he sought possession of the land and the removal of a caveat lodged by the children - the primary judge found that Susan was in adverse possession of the land as against Angelo from the time she changed the locks in 2004 and that Victoria and Ben continued that adverse possession after Susan died - the trial judge found that the period of adverse possession had continued for the requisite period of 15 years before the commencement of Angelo's counterclaim - Angelo sought leave to appeal - held: the common law presumed that possession by one co-owner was possession by and for the benefit of all co-owners - it was necessary to prove ouster for one co-owner to establish possessory title against the other co-owner - this position is altered by two deeming elements in s14(4) of the *Limitation of Actions Act*, one negative and one positive - the negative deeming element enables a co-owner to bring an action to recover possession by not deeming the possession or receipt of profits of the other co-owner to be his possession or receipt, thus making the possession of co-owners separate - the second deeming element deems the possession or receipts of the profits to be adverse possession as defined in s14(1) - the remaining co-owner must have a sufficient degree of physical custody and control of the land to have factual possession of the entirety for their own benefit and the benefit of any other person except the other co-owner, and they must have an intention to exercise that degree of custody and control for their own benefit and the benefit of any other person except the other co-

owner - s14(4) requires both factual possession and an intention to possess, that is the exercise of custody and control on one's own behalf and for one's own benefit - it was plain Susan did not take exclusive possession pursuant to a lease or any other form of consensual arrangement - the children had proved that Susan intentionally took possession of the land for the benefit of herself and the children - there was no evidence Angelo consented to the changing of the locks which constituted the critical act of dispossession, or to the continuing exclusive possession by Susan of the land - that Angelo acquiesced in Susan's occupation of the land did not demonstrate that Angelo consented to the occupation of the land to the exclusion of himself - the payment of mortgage instalments was not use of the land - Angelo's storage of remnant belongings in part of the garage on the land did not demonstrate that Susan took and maintained possession in part for the benefit of Angelo - leave to appeal refused.
Gianchino (I B C)

Poem for Friday

Break of Day in the Trenches

By: Isaac Rosenberg (1890-1918)

The darkness crumbles away.
It is the same old druid Time as ever,
Only a live thing leaps my hand,
A queer sardonic rat,
As I pull the parapet's poppy
To stick behind my ear.
Droll rat, they would shoot you if they knew
Your cosmopolitan sympathies.
Now you have touched this English hand
You will do the same to a German
Soon, no doubt, if it be your pleasure
To cross the sleeping green between.
It seems you inwardly grin as you pass
Strong eyes, fine limbs, haughty athletes,
Less chanced than you for life,
Bonds to the whims of murder,
Sprawled in the bowels of the earth,
The torn fields of France.
What do you see in our eyes
At the shrieking iron and flame
Hurled through still heavens?
What quaver—what heart aghast?
Poppies whose roots are in man's veins
Drop, and are ever dropping;
But mine in my ear is safe-
Just a little white with the dust.

Isaac Rosenberg was born in Bristol, England in 1890. His family, which had fled Lithuania, then settled in Stepney, London in 1897. His family's financial situation was described by Rosenberg's biographer, Jan Wilson as *"an existence on the edge of destitution*". At school he was noticed to be a skilled writer and artist. Much of his early artwork was drawn in chalk on the pavements of the East End. He was made to leave school at 14 to be an apprentice engraver, work he described as being "*chained to this fiendish mangling- machine when my days are full of vigour and my hands and soul craving for self – expression".* He was later noticed drawing at the National Gallery and benefactors paid then for his education. He suffered from feelings of great inadequacy

although he was described by some as self-reliant, modest, independent and sensitive. His first poems were published as "*Night and Day*." In October 1915 he joined the army, taking with him a copy of John Donne's poems, and not telling his family that he had enlisted. He endured great deprivation in extreme conditions, and anti-semitism. He wrote on scraps of paper his poems which he sent home to his sister to type. His greatest poems were considered to be *Dead Man's Dump* and *Break of Day in the Trenches*, first published in Poetry magazine. Rosenberg was killed in April 1918 while on patrol, on the western front, during the German spring offensive in the closing months of the First World War. Isaac Rosenberg is remembered with a plaque in Poets' Corner, Westminster Abbey, where other revered writers such as Shakespeare, Dickens and Emily Bronte are commemorated. Prof. Bergonzi rated Rosenberg as "*undoubtedly one of the finest poets that the Great War produced*".

Jeremy Vine, British TV and radio presenter, reads Isaac Rosenberg's ***Break of Day in the Trenches***
https://www.youtube.com/watch?v=dPakEd0Ul3Q

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