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Benchmark

Friday, 16 June 2023

Daily Civil Law

Today's Benchmark is published in memory of our friend and colleague, Catherine Vidler (1973-2023)

A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

Lehrmann v Network Ten Pty Limited (Tribunal of Fact) (FCA) - trial by jury not ordered, given the publicity the case and the related criminal case had attracted (I)

Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd (NSWCA) - the *Foreign States Immunities Act 1985* (Cth) does not suscept a foreign State, or a separate entity of a foreign State, to winding up proceedings in Australia (I B)

Khattar v Khattar; Fayad v Khattar (NSWCA) - deeds of settlement and agreement concerning property development construed in family dispute (I B C)

Martin v Amaca Pty Ltd & Ors (No 2) (VSC) - asbestos product manufacturer failed in contribution proceedings against the Scouts and a school where the Scouts met, as the manufacturer had failed to show there was asbestos at the school location (B I)

Garrett v VWA (VSCA) - an employer of two armed security guards was not vicariously liable for the actions of one guard where he drew his loaded firearm and pointed it at the head of the other guard (I B)

HABEAS CANEM

Big and Little

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Summaries With Link (Five Minute Read)

Lehrmann v Network Ten Pty Limited (Tribunal of Fact) [2023] FCA 612
Federal Court of Australia
Lee J
Defamation - the judge had previously given judgment granting an extension of time in which to bring two proceedings (see Benchmark for 2 May 2023) and had invited submissions from all parties as to whether the Court should direct a trial by jury - one of the proceedings had since concluded, and the only remaining proceeding was in respect of Network Ten - all parties to the Network Ten proceeding were unified in opposing a direction that there be a trial by jury of either all or some factual issues to be determined - held: although relevant, the opposition of the parties is not dispositive - there was no limitation on the discretion under s40 of the *Federal Court of Australia Act 1976* (Cth) that an order for trial by jury can only be made on application by a party - the Court could make such an order on its own motion if it considered it appropriate to do so - the parties had advanced three reasons why there should not be a trial by jury - first, s39 of the *Federal Court of Australia Act* evinces a general policy of trial by judge alone and there is only power under s40 to direct the trial by jury of particular issues of fact where "the ends of justice appear to render it expedient to do so" - this submission put the point too highly - second, the Chief Minister and the Attorney-General of ACT had established a Board of Inquiry pursuant to s5 of the *Inquiries Act 1991* (ACT) to examine the conduct of criminal justice agencies involved in the criminal proceedings related to this matter - this reason had no weight - third, the allegations to be determined as part of the justification defence had attracted vast publicity, and it would be difficult, if not impossible, to assemble a pool of potential jurors who had not already been exposed to detailed public accounts of the evidence given at the criminal trial and who had not already have formed views about that evidence, the credibility of some witnesses, and, ultimately, the plaintiff's guilt or innocence - this argument was decisive - the law recognises that jurors ordinarily heed directions but this recognition is tempered by realism - it was common ground that the principal battleground at trial will concern the respondents' substantive defences of justification, common law qualified privilege, and qualified privilege pursuant to s30 of the *Defamation Act 2005* (NSW) - trial by jury not ordered.
Lehrmann (I)

Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd [2023] NSWCA 134
Court of Appeal of New South Wales
Bell CJ, Meagher JA, & Kirk JA
Insolvency - the appellants were companies incorporated in Ireland who leased aircraft to the respondent, Garuda - Garuda is a foreign company registered under Div 2 of Pt 5B.2 of the *Corporations Act 2001* (Cth) and is the national airline of Indonesia, and is also a "separate entity" of a foreign state within the meaning of the *Foreign States Immunities Act 1985* (Cth) - the appellants applied for orders that Garuda be wound up on the basis that it was unable to pay its debts or otherwise that it was just and equitable to do so - Garuda filed a notice of

motion seeking a declaration that the Court had no jurisdiction over it by reason of s9 of the *Foreign States Immunities Act* - the primary judge made the declaration sought - the appellants sought leave to appeal - held: the literal meaning of a statutory provision will not always accord with its legal meaning, which is to be derived from a full consideration of the language of the statute viewed as a whole and the context, general purpose, and policy of the statute or a provision within it, to the extent that that is separately discernible - purpose may also be disclosed, in particular cases, by reference to secondary materials including the reports of law reform bodies which form part of the context of a statute - the *Foreign States Immunities Act* was the direct product of the ALRC's Report No 24, *Foreign State Immunity* (1984), which was significant because, although it could not displace the clear meaning of the Act, it assisted in ascertaining the legislative context and purpose and the particular mischief that the legislation was seeking to remedy - the primary judge had correctly held that s14(3)(a) of the *Foreign States Immunities Act* does not suscept a foreign State, or a separate entity of a foreign State, to a winding up proceeding in Australia - reference to the ALRC Report makes plain that the legislative reforms recommended by it, in partial implementation of a restrictive view of sovereign immunity, were in no way intended to subject a foreign body corporate, which the *Foreign States Immunities Act* treated as having the benefits of a foreign State's immunity, to winding up proceedings in Australia - leave to appeal granted but appeal dismissed.
View Decision (I B)

Khattar v Khattar; Fayad v Khattar [2023] NSWCA 133
Court of Appeal of New South Wales
Ward P, Meagher JA, & Griffiths AJA
Contracts - George Khattar died in 2010 leaving his widow (the first respondent), and their two children (the second and third respondents) - the deceased also left two siblings (the appellants), who were also executors of the deceased's estate - the widow and children sought revocation of the grant of probate that had been made in favour of the siblings - that dispute was resolved after mediation and the parties entered into a Deed of Settlement of the proceedings and a Deed of Agreement - under the deeds, the siblings agreed to "facilitate" the acquisition, by the trustee of a trust to be controlled by the widow and her accountant, of 20 unencumbered residential units in a residential development, the construction of which was then being undertaken by a company associated with the deceased - the agreed value of the units was acknowledged by the parties to be over 15million - the development was not completed and the units were not transferred in the time frame contemplated by the deeds - the widow and children sued the siblings for repudiatory breach of the deeds - the primary judge found in favour of the widow and children - the siblings appealed - held: the primary judge had been correct in his construction of the Deed of Agreement - the context in which the Deed of Agreement was entered into, as part of the overall settlement of the probate proceeding, makes clear that the respondents were to receive property (and/or cash) to the value of $20 million and that the bulk of this was to be comprised by units - the inconsistent use of language ("facilitate" in some clauses, "cause" in others) did not assist the siblings, because there was no consistent differentiation between clauses in which the siblings were required to facilitate an outcome as

opposed to causing an outcome - the complaint that it would be unlikely for the siblings o have assumed a personal obligation to do something that they were not legally in a position to compel ignored the fact that the parties were involved in a joint venture, and the settlement was negotiated with the active involvement of the husband of one of the siblings, who was in a position to cause the development company to take the requisite steps and who was clearly being relied upon by the siblings to deal with the matters surrounding the development and the separation of the interests in that development - the siblings had not established a sufficient basis upon which to depart from the rule in *Clark v Macourt* [2013] HCA 56; 253 CLR 1 that contractual damages are assessed as at the date of the breach - therefore, the Court should not have regard to subsequent events, including financing arrangements with another company and the execution of security rights by that company, in assessing damages - appeal dismissed.
View Decision (I B C)

Martin v Amaca Pty Ltd & Ors (No 2) [2023] VSC 319
Supreme Court of Victoria
John Dixon J
Negligence - the plaintiff had been a member of the Scouts, and had attended a Scout Hall at St Bede's Primary School between 1980 and 1983 when he was about 12 to 15 - he was exposed to material that a scout leader identified at the time as asbestos - the plaintiff was also exposed to asbestos from domestic renovations at his family home, also in about 1980 - in 2020, the plaintiff contracted mesothelioma - the plaintiff sued the asbestos product manufacturer Amaca Pty Ltd in respect of the exposure to asbestos during the home renovations - Amaca settled the proceedings for just over $1million - Amaca then sought contribution and/or indemnity from the Scouts and St Bede's - held: was no direct evidence before the court of the presence of asbestos in the Scout Hall - Amaca bore the burden of showing, having regard to the whole of the circumstances demonstrated by the evidence, that the probable inference was that, prior to 1980, limpet asbestos spray was applied to the RSJ beams in the Scout Hall, permitting the further inference that there was asbestos in the Scout Hall when the plaintiff was there on scouting activities - where circumstantial evidence is relied upon, it is the weight which is to be given to the united force of all of the circumstances in combination which must be considered - the Court was satisfied that, when the plaintiff was in the Scout Hall engaged in scouting activities, insulation matter was dislodged from the RSJ beams in the hall - however, the Court was not persuaded that it was more probable than not that this material contained asbestos - the plaintiff's evidence could not establish the presence of asbestos, only that he honestly believed that he was told there was asbestos in the Scout Hall and that the debris should not be handled - the statement of the Scout leader reported by the plaintiff that the debris was asbestos was not an admission constituting an exception to the hearsay rule pursuant to s81 of the *Evidence Act 2008* (Vic) - contribution proceedings dismissed.
Martin (B I)

Garrett v VWA [2023] VSCA 144
Court of Appeal of Victoria

Beach, T Forrest, & Kaye JJA

Vicarious liability - the applicant and another employee were employed by Staff Factory as armed security guards - they were required to escort a truck carrying a copper cylinder from the Royal Australian Mint to afactory for service, and to escort the truck back to the Mint after the service was completed - while the applicant and the other employee were waiting in their motor vehicle outside factory, the other employee, for no apparent reason, pulled his loaded .38 Smith & Wesson firearm out of its holster and pointed it directly at the applicant's head - the applicant claimed that, as a consequence of the incident, he suffered psychiatric injuries, including Post Traumatic Stress Disorder and a Major Depressive Disorder - Staff Factory had been deregistered, and so the application commenced proceedings directly against Staff Factory's employer pursuant to s601AG of the *Corporations Act 2001* (Cth) - the primary judge dismissed the claim on the basis that Staff Factory had not breached its duty of care to the applicant and that it was not vicariously liable for the conduct of the other employee - the applicant sought leave to appeal - held: the conduct of the other employee had been a criminal offence, and it was well-established that an employer may be vicariously liable for a tort committed by an employee, notwithstanding that the tort consists of a criminal offence by that employee - it is not sufficient that the employment of the wrongdoer provided the opportunity for the commission of that wrongful act - nor is it sufficient that there was a significant or very close connection between the employment of the wrongdoer and the creation or enhancement of the risk of the wrong - the critical test is whether the specific role assigned by the employer to the wrongdoer, and the performance by the wrongdoer in that role, has constituted the occasion for the commission by the employee of the wrongful act - in determining that question, it is necessary to take into account specific features of the role assigned to the employee, which include characteristics such as authority, power, trust, control, and the ability to exploit a relationship in respect of a vulnerable victim - in this case, the employer had engaged the other employee as an armed security guard and for that purpose armed him with a loaded firearm - this case was closer to the line for vicarious liability than other cases - however, the actions of the other employee were entirely disconnected from the role that he was required to perform as a security guard, and, while his employment as an armed security guard might have enabled him to misuse his firearm to threaten the applicant, it otherwise lacked any other connection with the duties entrusted to him - it could not be concluded that that employment, or the circumstances of it, constituted the "occasion" for the commission of the tort by the other employee - leave to appeal granted, but appeal dismissed.

Garrett (I B)

Poem for Friday

a small leaf

By: Catherine Vidler (1973-2023)

a small leaf :: water-baubles sweetly
trembling :: just there :: like liquid glass
on veined-foundation :: one two threely ::
more :: space surrounds :: lively :: quiesc-
ent :: behind my sheer transfixed eyelid ::
reaching clear-through the dark & turbid ::
such shining :: curvaceous & full
under a breeze's push & pull ::
so robust & so delicately ::
light & dark :: also in between ::
a teeming like I've never seen
within clear membrane :: intricately
world-full & otherworldly too ::
so tiny :: ancient & brand new
:::
I've lost my way :: the sky is greyly ::
slight smears upon the looking glass ::
this separation from the daily
trajectory :: it comes :: it pass-
es :: where are you :: sweet jacaranda
shedding of blossom :: sea & sand are
making their own map over there ::
or closer still :: this charged-up air
alights upon my naked flesh :: so
briefly tender :: it flits & flies
between the lowlies & the highs ::
trembling before the burning threshold ::
close me my eyes & search the light-
streaked darkness here :: inside-of sight

Catherine Vidler, (1973-2023), was the editor of Benchmark from August 2012 to November 2021, returning in early 2023 as a contributing editor. Catherine is a published poet whose work has appeared in literary magazines in Australia, New Zealand, the US and the UK. She was a co-founder and editor, from 2005, of Snorkel, a trans- Tasman literary magazine. Her works include *Matchstick Poems* (2022), *Wings (2021), Lost Sonnets* (2018), *78 composite lost sonnets* (2018), *Table sets* (2017), *Chaingrass*,

(2016), *Chaingrass errata slips* (2017), *Furious Triangle* (2011), *Cloud Theory* (2007), and *Canberra Poems*. Catherine was talented and intelligent, interesting, encouraging, always surprising and our beautiful friend and colleague. She was brave and resilient during her long illness.

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