AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 22 March 2024

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)

Shergill v Singh (No 2) (FCA) - maximum pecuniary penalty imposed on former Indian High Commissioner who had personally employed a domestic worker in slave-like conditions (I B)

Taylor v August and Pemberton Pty Ltd (FCA) - findings of sexual harassment and victimisation made and damages assessed (B I)

Taylor v Central Coast Local Health District (NSWSC) - Court approved a settlement of judgment for the defendant and no order as to costs, where it had emerged that the infant plaintiff's catastrophic injuries were likely congenital and not the result of injury during birth (I)

In the matter of H & H Funding Pty Ltd (in liquidation) (receiver and manager appointed) (NSWSC) - director of an unsuccessful plaintiff was ordered to be personally liable for the costs order made against the plaintiff (I B C)

Jones v Jones (NSWSC) - Court ruled under s73 of the *Civil Procedure Act 2005* (NSW) that an exchange of emails between solicitors had settled family provision proceedings (B I)

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

HABEAS CANEM

Floating on a sea of green

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)

Shergill v Singh (No 2) [2024] FCA 261
Federal Court of Australia
Raper J
Employment law - Shergill was a domestic worker in the house of Suri, who was then the Indian High Commissioner to Australia - the Court had found that Shergill's employment conditions, which included her passport being taken from her, working seven days a week, never being permitted to take leave and only being allowed outside the house for brief periods in the day when looking after Suri's dog, involved significant breaches of Australian law, namely contraventions of s323, s536, s44(1) and s45 of the *Fair Work Act 2009* (Cth), each of which was a civil penalty provision - the Court now considered pecuniary penalties - held: the primary, if not sole, purpose of a civil penalty is deterrence - penalties will be appropriate where they are no more than might be considered reasonably necessary to deter further contraventions of a "like kind" by the contravener and others - the maximum penalty is "but one yardstick" amongst a number of other relevant factors to be considered - the Court is required to strike a reasonable balance between deterrence and oppressiveness - each of the contraventions was egregious and exploitative, and fell in the high range of seriousness - by never permitting Shergill to take a day's leave, never allowing her to leave his diplomatic residence except for brief periods when looking after the dog, and depriving her of her passport at all time, Suri deprived Shergill of visibility and the protections which come with it, namely the ability to participate in Australian society and to know and avail herself of its protection - Suri also created a documentary artifice giving the erroneous impression that Shergill was engaged by the Indian High Commission in an attempt to avoid his obligations as her employer under Australian law - it was appropriate to award the statutory maximum for each of the nine contraventions - the application of the totality principle did not call for any reduction of the penalties to be imposed - maximum available penalty of $97,200 imposed.
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0261 (I B)

Taylor v August and Pemberton Pty Ltd [2023] FCA 1313
Federal Court of Australia
Katzmann J
Human rights - Taylor complained that she was sexually harassed by Grew while she was employed by his jewellery company, and that Grew victimised her after she complained - Taylor alleged Grew had given her 19 gifts, that Grew had made unsolicited and unwelcome comments to her about her appearance, that Grew had slapped her on the buttocks, and that Grew had declared having feelings for her - held: Grew's acknowledgment that he had "feelings" for Taylor was an admission that he was attracted to her and was interested in pursuing a romantic relationship with her - the gifts had been unsolicited - the Court was comfortably satisfied that Grew slapped Taylor with a cupped hand on her right buttock - Grew had made some of the alleged unsolicited comments - it was impossible to conclude that all the gifts were unwelcome,

but the two gifts given after Grew had declared his feelings for Taylor were unwelcome - although most of the gifts were items of jewellery, Grew was a jeweller and Taylor worked in the jewellery business - the gifts given after the declaration of feelings were expressions of Grew's affection for Taylor and his desire to enter into a romantic relationship with her and were therefore, both individually and collectively, either a sexual advance or other conduct of a sexual nature - the slap was both unwelcome and of a sexual nature - a declaration of love may be a "sexual advance" depending on the context - Grew's statement that he had "feelings" for Taylor was an expression of his desire to enter into an intimate personal relationship with her, and implicit within it was a desire for sex - this conduct was also unwelcome - the Court was not persuaded that a reasonable person would have anticipated the possibility that Taylor would be offended, humiliated, or intimidated by the giving of the gifts - the Court was not persuaded that such a person would have anticipated the possibility Taylor would be offended, humiliated or intimidated by the remarks about her appearance - the Court was comfortably satisfied that in all the circumstances a reasonable person would have anticipated that possibility that the slap and the confessions of feelings would cause Taylor to be offended, humiliated or intimidated - the Court therefore held Grew sexually harassed Taylor when he slapped her and when he declared his feelings for her - Grew had also committed victimisation - general damages awarded of $140,000 for the sexual harassment and $40,000 for the victimisation - aggravated damages of $15,000 awarded - other heads of damage also assessed - the Court would make orders to deal with the question of additional relief if that claim is maintained.
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca1313 (B I)

Taylor v Central Coast Local Health District [2024] NSWSC 230
Supreme Court of New South Wales
Campbell J
Medical negligence - the plaintiff claimed damages through her mother as tutor for an alleged birth injury that had result in catastrophic disabilities including profound cerebral and neurocognitive deficits and physical disabilities - the case was originally cast as one of hypoxic brain injury due to asphyxia during the very long labour of the plaintiff's mother and the plaintiff's very difficult birthing - it then emerged, not only in the defendant's case but also from other highly qualified experts approached by the plaintiff, that the better view was that the plaintiff's injuries and disabilities were due to congenital and developmental factors - the Court was asked to approve a settlement under s76(4) of *the Civil Procedure Act 2005* (NSW) - the agreement was for judgment in favour of the defendant and no order for costs, with the intention that each party bear its or her own costs - held: the Court noted that any parent who has a severely disabled child is doubtless faced with difficult choices, and one example was the position of the plaintiff's mother, where perhaps at one stage there appeared to be some avenue for her daughter to obtain compensation which would help support her in life had come to the conclusion that the prudent decision was to take advantage of the defendant's offer to bear its own costs which would not be insignificant at all - given the absence of persuasive evidence of birth injury, it was unnecessary to consider in detail the case that had been built and

framed in negligence - the Court's obligation as to make the decision which it appears to me that will be in the plaintiff's best interests - it seemed to the Court that the financial position of the plaintiff's mother is not irrelevant to the plaintiff's best interests - further, the Court had had the advantage of a confidential advice of an very experienced counsel who practices extensively in this area of medical negligence, in relation to the issues and their likely outcome - the Court was persuaded that the settlement was in the plaintiff's best interests.
View Decision (I)

In the matter of H & H Funding Pty Ltd (in liquidation) (receiver and manager appointed) [2024] NSWSC 248
Supreme Court of New South Wales
Black J
Costs - Noda sought an order that the liquidator of H&H Funding pay an amount held by that company to receivers it had appointed to H&H Funding - the liquidator was at the same time investigating the circumstances in which H&H Funding had granted the security on which Noda relied - Noda initially sought to establish the validity and enforceability of that security in the proceedings, but then abandoned that attempt - Noda's claim against the liquidator was unsuccessful - the Court made orders that the proceedings be dismissed, and ordered that Noda and the receivers appointed by it jointly and severally pay the costs of the proceedings - the liquidator sought an order that Huo, the director and shareholder of Noda, be personally liable for those costs - held: costs are generally ordered against a non-party where a party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation - relevant factors are whether the unsuccessful party to the proceedings was the moving party and not the defendant; the source of funds for the litigation for the non-party or its principal; whether the conduct of the litigation was unreasonable or improper; and whether the non-party, or its principal, had an interest which was equal to or greater than that of the party; and whether the unsuccessful party was insolvent or could otherwise be described as a person of straw - here, Noda was the moving party; Noda was not the source of the funds for the litigation, not having a bank account; the proceedings were dismissed as a result of Noda failing to secure an amendment that it sought on the day of the hearing; Huo had a direct interest in the proceedings; and Noda as a person of straw - on any view, Noda's conduct amounted to unreasonable conduct of the proceedings, and, if it were necessary to do so, the Court would find that it was inconsistent with Noda's obligations under s56 of the *Civil Procedure Act 2005* (NSW) in respect of the just, quick, and cheap resolution of the real issues in dispute in the proceedings - the Court was comfortably satisfied that an order should be made that Mr Huo be personally liable for the costs order - an amount Noda had paid into Court pursuant to a security for costs order should be paid to the defendants and set-off against any costs recoverable by them.
View Decision (I B C)

Jones v Jones [2024] NSWSC 210
Supreme Court of New South Wales
Elkaim J
Succession - a deceased died, leaving a will which gave her entire estate to her son - a daughter of the deceased commenced proceedings against her brother, seeking orders that probate not be granted to him, or, alternatively, that she should receive adequate provision from the estate under s59 of the *Succession Act 2006* (NSW) - the only substantial estate asset was a purported right to obtain real property that was still registered in the name of the parties' maternal grandparents - it was possible a cousin of the parties may also claim an interest in the property - the parties negotiated as to the percentage of the estate that the daughter would receive, and then as to the mechanics of giving effect to that agreement - 27% to the daughter was agreed between the parties and confirmed in an exchange of emails between solicitors - an unexecuted deed was then exchanged by the parties in identical counterparts - the daughter sought orders under s73 of the *Civil Procedure Act 2005* (NSW) to the effect that the proceedings had been resolved - the brother resisted this - held: the decisive issue was the intention of the parties which had to be objectively ascertained from the terms of the document read in the light of the surrounding circumstances - the starting point for such an objective assessment was the pleadings, in particular the purpose of obtaining a family provision order - this purpose was achieved by the exchange of emails between the solicitors - this exchange objectively confirmed the reaching of an agreement in respect of the family provision proceedings - it was not necessary to nominate a category from *Masters v Cameron*, but, if compelled, the Court would have characterised the agreement as falling within the first category or the so-called fourth category - it would have more cost-effective and productive if the Court were to find that the deed was also enforceable, as the deed resolved a number of ancillary matters that the exchange of emails did not, which could take a lot of time an money to resolve - however, the Court was unable to find the deed constituted a binding agreement, due to a notation by the Court in earlier orders, in which the Court noted that there was "seemingly" no dispute over the terms of the deed, but that the brother had resiled from the settlement and declined to sign the deed, and because s73 is concerned with "any question in dispute between the parties to the proceedings as to whether, and on what terms, the proceedings have been compromised or settled between them" and not with the ancillary matters - orders made that the exchange of emails had settled the family provision proceedings.
View Decision (B I)

Poem for Friday

Our Destiny

By: (Myee) Minnie Louisa Brackenreg (1858-1936)

Would we pierce that mystic curtain
That enshrouds our future years?
Would it please us to be certain
Of their joys, and pains, and tears?

Would life's pathway be as pleasant
If we knew that we should fall
From the ideals of the present,
Losing, maybe, faith in all?

Would a rose bloom just as sweetly
If it knew a summer storm
Would its beauty spoil completely,
Leaving it all crushed and torn?

Better keep Hope's bright star shining
With its clear celestial ray,
By no thoughts of our inclining
To lift the veil and spoil the day.

Minnie Louisa Brackenreg ("Myee") was born in 1858 to George and Dorcus Owen in Sydney. She married George Brackenreg in Maitland in about 1978. They had eight children, three of whom died in infancy or at birth. Her husband was the founding member of the NSW Rugby Football League (NSWRFL). She wrote, under the pen name Myee, three volumes of poetry. She lived her later years in the Blue Mountains, west of Sydney, following separation from, and then the death of her husband. *Gems from the Mountains* published in 1922 is available online through the State Library of Victoria https://viewer.slv.vic.gov.au/?entity=IE1751931&mode=browse. Her work was often inspired by religious images and themes. Chaplain Major Colwell of Katoomba, a methodist minister, wrote of Minnie Brackenreg in the forward to one of her volumes: *"She has a great love of nature, and can see the Hand of God in it all, also the many lessons God desires to teach us through His Beautiful gifts*". She had 11 poems published in her local newspaper *The Blue Mountain Echo.* She died in 1936 in Katoomba. Her gravestone bears only the words "Myee 1936". She is one of the many forgotten Australian poets of the early 20th century.

Click Here to access our Benchmark Search Engine