

Friday, 23 August 2024

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)

Steven Moore (a pseudonym) v The King (HCA) - the correctness standard, rather than the *House v The King* standard, applies to appellate review of a trial judge's decision whether to exclude evidence under s137 of the uniform *Evidence Acts*, even in interlocutory appeals (B I)

Seaforth Securities Pty Limited v Zoya Investments Pty Limited (NSWSC) - damages assessed on the basis of diminution of the value of land that had been contaminated by a petrol station on adjoining land (I B C)

Heywood v Local Court of New South Wales (NSWSC) - order in the nature of prohibition made precluding a Magistrate from continuing to hear criminal proceedings, where the Magistrate had engaged in sarcasm and criticism towards the defendant's legal representatives (B I)

Monash Health v Carina & Ors (VSC) - medical panel had not erred in finding a threshold level of psychiatric impairment following allegedly negligent surgery (I)

Holloway v Commissioner of State Revenue (TASSC) - Court ordered rectification of a trust deed where a mistake in drafting led to a stamp duty concession being unavailable (B C I)

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Summaries With Link (Five Minute Read)

Steven Moore (a pseudonym) v The King [2024] HCA 30

High Court of Australia

Gageler CJ, Edelman, Steward, Gleeson, & Beech-Jones JJ

Hearsay evidence - the Crown alleged that the appellant entered the complainant's house without her permission and to have made threats, prevented her from leaving, and caused her to lose consciousness by smothering her - he was also charged with attempting to pervert the course of justice by offering to pay the complainant to have the charges withdrawn - he pled not guilty to the initial offences, but guilty to attempting to pervert the course of justice - the complainant died before trial, and the Crown served hearsay notice stating that it intended to lead evidence of representations made by the complainant - the trial judge ruled the evidence was admissible, and declined to exclude it under s137 of the *Evidence Act 2008* (Vic) - the Victorian Court of Appeal dismissed an appeal from this ruling, reviewing the trial judge's decision under s137 by reference to the principles stated in *House v The King* - the appellant was granted special leave to appeal to the High Court - held: the application of s137 requires the making of three evaluative assessments: (1) the weight of the probative value of the evidence; (2) the extent of any danger of unfair prejudice; and (3) a comparison of one with the other - there can only be a single correct answer resulting from this process - therefore, the correctness standard, under which the appellate court determines for itself the correct outcome while making due allowance for such "advantages" as may have been enjoyed by the primary judge, applies to interlocutory appeals from rulings under s137 of the uniform *Evidence Acts* - the distinction between the standard of review of decisions under s137 applicable to interlocutory appeals and the standard applicable to conviction appeals should no longer be accepted - however, in this case, the decision of the trial judge to refuse to exclude the evidence under s137 was correct, even when assessed under the correctness standard - appeal dismissed.

[Steven Moore \(a pseudonym\)](#) (B I)

Seaforth Securities Pty Limited v Zoya Investments Pty Limited [2024] NSWSC 1061

Supreme Court of New South Wales

Harrison AsJ

Negligence - Seaforth and Zoya owned neighbouring properties on the NSW Central Coast, and Zoya conducted a petrol station business on its property - petroleum hydrocarbon contamination was identified in the groundwater of Seaforth's property and the petrol station was the likely source - Seaforth commenced proceedings, and there was no appearance by Zoya, which had resolved that it be wound up - the Court delivered default judgment - the Court now determined damages - held: Seaforth had to establish with evidence its entitlement to the quantum of damages it sought - usually, the appropriate measure of damages for injury done to land the diminution in value of the land or the costs of reinstatement - courts will start with what the plaintiff has asked for, and then consider whether that measure of damages is fair and reasonable in light of the injury suffered, the difference between the diminution in value on the

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one hand and reinstatement costs on the other, and any special value in the land - Zoya had been negligent and had created a nuisance by recklessly allowing the migration of petroleum hydrocarbons into the ground from its petrol station to contaminate Seaforth's land - whether Zoya's conduct were conceived of as nuisance or negligence or both, the measure for damages was the same - Seaforth was entitled to damages for the diminution in the value of the Seaforth property attributable to Zoya's nuisance and negligence - the Court found this amount to be \$7.45million - Zoya's behaviour also demonstrated that it has been guilty of a conscious wrongdoing and a contumelious disregard of Seaforth's rights - exemplary damages of \$700,000 also awarded, taking into account that there was some overlap between these proceedings and Land and Environment Court's proceedings in which Zoya had been fined \$320,000.

[View Decision](#) (I B C)

Heywood v Local Court of New South Wales [2024] NSWSC 1047

Supreme Court of New South Wales

Lonergan J

Apprehended bias - Heywood was the Vice-Chancellor of the University of New England and a guest speaker at an International Women's Day event in Armidale - it was alleged that, as attendees mingled after the event, Heywood licked her index finger and wiped it on a schoolgirl's face, making an offensive and racist comment as she did so - she was charged with common assault as referred to in s61 of the *Crimes Act 1900* (NSW) and behaving in an offensive manner in a public place contrary to s4(1) of the *Summary Offences Act 1988* (NSW) - she now sought prerogative relief under s69 of the *Supreme Court Act 1970* (NSW) to prevent a Magistrate from continuing to hear criminal proceedings involving the two charges - the Magistrate had refused an application that he disqualify himself for apprehended bias, and also refused an application for an adjournment - Heywood contended that the Magistrate manifested apprehended bias by reason of his comments to and about Heywood's legal representatives, his intervention during cross-examination of witnesses, and his gratuitous and belittling comments made during three hearing days and a return of subpoena argument - held: the Magistrate had engaged in sarcasm and criticism towards Heywood's legal representatives - the fact that the Magistrate's hostility was directed towards Heywood's legal representatives and not her personally was not to the point - the cumulative effect of the Magistrate's conduct was that a fair-minded lay observer may reasonably apprehend that, given the Magistrate's apparent animus, contempt, and disdain for Heywood's counsel, and to a lesser extent, her solicitor, he might be unable to put aside a mindset unfavourable to Heywood and resolve the case dispassionately - order in the nature of prohibition made precluding the Magistrate from continuing to hear the proceedings.

[View Decision](#) (B I)

Monash Health v Carina & Ors [2024] VSC 486

Supreme Court of Victoria

Watson J

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Medical negligence - Carina underwent a left inguinal hernia operation at Monash Medical Centre, a hospital operated and managed by Monash Health - she claimed the operation was unnecessary because there was no direct or indirect hernia and that a CT scan of the abdomen and pelvis did not find such a hernia - Carina alleged that Monash Health was negligent in its surgical assessment, surgical management and medical treatment provided to her and because its post-operative care was not adequate - she commenced proceedings and physical injury was referred to a medical panel, which found that she did not have the degree of whole person impairment resulting from her physical injury which satisfied the threshold level - psychiatric injury was also referred to a medical panel, which found that Carina did have a degree of psychiatric impairment resulting from the injury which she alleged in her claim which satisfied the threshold level - Monash Health sought judicial review - held: the medical panel did not assess injuries beyond those alleged in Carina's claim against Monash Health - the medical panel had not had regard to secondary psychiatric symptoms in its determination - there had been evidence before the panel of a primary psychiatric condition and so its finding of a primary psychiatric condition was open - the medical panel's decision was not unreasonable or illogical - proceedings dismissed.

[Monash Health](#) (I)

Holloway v Commissioner of State Revenue [2024] TASSC 45

Supreme Court of Tasmania

Blow CJ

Mistake in equity - a solicitor drafted and was the settlor of a family trust, intended to allow the plaintiffs (a de facto couple who were also the trustees) to purchase farming land from the executor of the estate of the great uncle of one of them, and to qualify for the intergenerational rural transfer exemption created by s225 of the *Duties Act 2001* (Tas) - the solicitor did not amend her firm's template discretionary trust deed to comply with the instructions of the plaintiffs, and in particular did not limit the beneficiaries of the trust to the two plaintiffs - the State Revenue Office considered the transfer of the farm therefore gave rise to liability for *ad valorem* duty - the solicitor and the plaintiffs signed a deed of rectification, but the State Revenue Office considered this was not binding on the Commissioner, and stated that an order of rectification was required - the plaintiffs therefore sought rectification of the trust deed and a declaration that the deed of rectification was of no effect - held: the Commissioner, although he had filed a submitting appearance and had not participated as a contradictor, was the only person whose interests might have been adversely affected by the orders sought, and was the proper defendant - a potential beneficiary under a discretionary trust does not have any sort of interest in the trust property, and merely has the right to have the trust properly administered - therefore, none of the potential beneficiaries under the trust deed as drafted needed to be joined as a defendant - rectification is an equitable remedy that is available to reform documents where there has been a mistake that has caused a document not to operate as intended by the parties - rectification can reform documents but not the bargain or arrangement between the parties - here, there was no bargain - in the case of a trust deed the mistake must be on the part of the settlor - rectification is generally not available where the mistake is only as to the legal



effect of the document - however, it is no bar to rectification that the rectification is sought to avoid stamp duty - the previous deed of rectification was also no bar to rectification by the Court - an order for rectification takes effect retrospectively, so that the document is rectified with effect from the date of its making - it was no bar that the mistake was due to negligence - the unchallenged and uncontradicted. It constitutes convincing proof that the trust deed did not reflect the intention of the settlor - regarding the rectification deed, the Court was satisfied that it was of no effect, as there is authority that a deed that does not set out all the terms necessary to give effect to the true intention of the settlor is of no effect - in any event, the trust deed could be rectified so as to exclude or reverse the attempt at rectification made by the deed of rectification - orders made as sought.

[Holloway](#) (B C I)



Poem for Friday

The Window

By Rumi (1207-1273)

Your body is away from me
but there is a window open
from my heart to yours.
From this window, like the moon
I keep sending news secretly.

Jalal ad-Din Muhammad Rumi, was born in Persia, (now part of Afghanistan) on 30 September 1207. He was a philosopher, scholar, medium and mystic. His poetry was written in Persian, but also Arabic, Greek and Turkish at times. His great influence and friend was Shams Tabrizi (1185-1248) a Persian Shafi'ite poet. After their meeting Rumi's beliefs and life changed forever. Some of Rumi's many inspirational words include *"Do not feel lonely, the entire universe is inside you"*, *"It is the inner bond that draws one person to another, not words"*. *Words are a pretext*, *"When the world pushes you to your knees, you're in the perfect position to pray"*, *"What hurts you, blesses you. Darkness is your candle,"* *"Why do you stay in prison, when the door is so wide open?"* His best known poem is Masnavi, 50,000 lines long, in 6 volumes, referred to as "the Koran in Persian". Rumi died on 7 December 1273, aged 66 years in Konya, Türkiye. After Rumi's death, his followers began the branch of Sufism, (Islamic mysticism), the Mevlevi Order, known as the "Whirling Dervishes". <https://simple.wikipedia.org/wiki/Rumi>

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