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Daily Insurance

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Russell v S3@Raw Pty Ltd (No 3) (FCA) - application to have serious harm element of defamation determined before trial in favour of a respondent dismissed

TT v The Diocese of Saint Maron, Sydney & SS (No 4) (NSWSC) - judgment that a Diocese was vicariously liable for historical sexual assault stayed, pending resolution of the High Court appeal from *Bird v DP* [2023] VSCA 66; 69 VR 408

Bucca v QBE Insurance (Australia) Ltd (NSWSC) - a review panel's failure to comply with the temporal requirements of the Medical Assessment Guidelines was neither an error of law on the face of the record, nor a constructive failure to exercise jurisdiction

Coster v Coster (NSWSC) - son failed in estoppel and common intention constructive trust claim against his mother, in respect of the farm she owned

Cigobia v Greyhound Australia Pty Ltd & Anor (QSC) - decision of medical assessment panel set aside, as the Act required the decision be made by the panel, not by the three doctors on the panel acting separately

Summaries With Link (Five Minute Read)

Russell v S3@Raw Pty Ltd (No 3) [2024] FCA 991
Federal Court of Australia

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Meagher J
Defamation - the applicant worked at a boutique Pilates and Barre studio - she commenced proceedings in defamation against the company that ran the studio and its director, contending that an Instagram post made by the business had carried defamatory imputations including that the applicant had acted deceitfully, dishonourably, and in breach of her contract, that she had conceived and executed a dishonourable plan to pretend that she was purchasing the respondents' business when she had no intention of doing so, and, that she had cheated the respondents out of a valuable business with substantial goodwill - there were also further allegedly defamatory Instagram posts - the director sought that the proceedings against him be dismissed pursuant to s10A of the *Defamation Act 2005* (Vic), on the basis that the serious harm element should be determined before trial and that the serious harm element was not satisfied - held: the better view is that s10A(5) of the *Defamation Act* is not picked up by s79 of the *Judiciary Act 1903* (Cth) - in any event, even if the Court were wrong about this, there were special circumstances to justify the postponement of the serious harm element until trial - the material facts as set out in the available material disclosed a reasonable cause of action - a request for further particulars of the serious harm alleged to have been suffered would be more appropriately sought through a formal request for particulars - the concerns notices served by the applicant were valid - application dismissed.
Russell

TT v The Diocese of Saint Maron, Sydney & SS (No 4) [2024] NSWSC 1102
Supreme Court of New South Wales
Elkaim AJ
Historical sexual assault - the plaintiff had alleged that he had been sexually abused as a child by a Deacon at the church where he and his family regularly attended - the plaintiff alleged he had been groomed by the Deacon over a period of time, and then abused in a motor vehicle in one specific incident - the plaintiff sued the Diocese and the Deacon, alleging that the Diocese was both vicariously liable and directly liable in negligence - the Court had given judgment in favour of the plaintiff against both defendants, finding that it was not satisfied that the grooming occurred but was satisfied that the specific assault had taken place, and rejecting the claim in negligence against the Diocese by upholding the claim for vicarious liability - the Court upheld the vicariously liability claim on the basis it was bound by a decision of the Victorian Court of Appeal (*Bird v DP* [2023] VSCA 66; 69 VR 408), because it was not satisfied *Bird* was plainly wrong, and because *Bird* was the subject of an appeal to the High Court which has been heard but not yet decided - the Diocese now sought an order that the Court's orders be stayed pending the decision of the High Court in *Bird* - held: if the High Court restricts vicarious liability to circumstances of employment only, then the Court's decision would be inconsistent with that result - the principles relating to the granting of this stay were set out in *Alexander v Cambridge Credits Corporation Limited* (1985) 2 NSWLR 685, and include that a judgment creditor is entitled to the fruits of his victory, but also that the strength of an appeal is a relevant consideration - there would be considerable strength in an appeal if the High Court restricts vicarious liability to only circumstances in which there is an employment connection between the

defendants - the possibility of a successful appeal in the High Court in *Bird* was sufficient to justify the granting of a stay - orders stayed.
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Bucca v QBE Insurance (Australia) Ltd [2024] NSWSC 1099
Supreme Court of New South Wales
Basten AJ
Motor accidents - the plaintiff was injured when a motorised buggy ran into her at the Royal Easter Show - the insurer accepted liability, but there was a dispute as to the level of permanent impairment suffered by the plaintiff - the plaintiffs entitlement to compensation for non-economic loss required permanent impairment greater than 10%, pursuant to s131 of the *Motor Accidents Compensation Act 1999* (NSW) - a combined certificate from two medical assessments found that she met the threshold - an review panel assessed her respiratory impairment as 0% and her physical impairment at 7% - the plaintiff sought judicial review, primarily on the basis of the lengthy and unexplained delay in the review panel issuing the certificates - held: the Medical Assessment Guidelines promulgated in 2018 did not apply to the proceedings before the review panel - the review panel clearly directed its assessment to the plaintiff's current degree of impairment - the review panel did not comply with the temporal obligations in the Medical Assessment Guidelines - it was implausible that a set of guidelines, made by a statutory authority, and not even a form of delegated legislation, should have been intended to create jurisdictional requirements - the times in the Guidelines were best identified as aspirational - it was not necessary to examine the precise limits of the statutory powers under which the Medical Assessment Guidelines were made - there was neither an error of law on the face of the record, nor a constructive failure to exercise jurisdiction, by the review panel in failing to comply with the temporal requirements of the Medical Assessment Guidelines - the review panel had not failed to accord procedural fairness to the plaintiff - the review panel had not erred in which it dealt with the plaintiff's sleep disorders - in the Permanent Impairment Guidelines and the American Medical Association, Guides to the Evaluation of Permanent Impairment, sleep is not identified as a body part or system to be assessed as contributing to the level of permanent impairment, and, like pain itself, effects involving sleep must be incorporated into the assessment of the body part or system which is the source of the pain - application dismissed.
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Coster v Coster [2024] NSWSC 1104
Supreme Court of New South Wales
Hmelnitsky J
Equity - a mother was the registered proprietor of a 700 acre farming property - her son contended that he lived and worked on the farm with his mother his whole adult life in reliance on express promises, or perhaps a common assumption, that his mother would eventually give the farm to him - he sought a declaration that his mother held 50% of the farm on trust for him - alternatively, he claimed that he and his mother had engaged in a joint endeavour which had

come to an end without any attributable blame, and that he was entitled in equity to a charge over the farm to secure the contributions made by him to their joint endeavour, which, on the basis of an expert report, he said was about $1.2million - held: a common intention constructive trust can arise where, at the time of the acquisition of property, there was a mutual intention of the parties that the property would be held jointly, whatever the legal title of the property, and the party lacking in legal title acts to his or her detriment on the basis of that intention - here, on the facts found by the Court, there was no agreement, promise, or common intention that the son should have any present beneficial interest in any property at the time of purchase or at any other time - the mother may well have contemplated that she would leave the farm to her son in her will, but that is a very different thing from intending at the time of purchase that he was or would be an owner of the property in the sense described in the authorities - the common intention constructive trust claim failed - the son's estoppel case also failed - the Court was not persuaded that the mother made the key representations alleged by the son - the Court found that the son would not have understood anything said by his mother, whether to him or anybody else, as to ownership of any property, to be a statement that the son might come to own either property during the mother's lifetime - the son would not have understood his mother to be saying anything other than that he would inherit the farm in her will if she still owned it - the son had also not demonstrated reliance on any alleged representations - the evidence did not demonstrate that any of the son's life decisions were explicable by his assumption that if he worked on his mother's farms, then the current farm would be his - the son had also not demonstrated that he would suffer any detriment, as he had never willingly suppressed his own capacity to accumulate his own capital - it was not unconscionable for the mother to assert her title to the farm - proceedings dismissed.
View Decision

Cigobia v Greyhound Australia Pty Ltd & Anor [2024] NTSC 70
Supreme Court of the Northern Territory
Kelly J
Workers compensation - the plaintiff made a claim for compensation under the *Return to Work Act 1986* (NT) which was accepted by Greyhound Australia - a doctor assessed WPI at 6% - the plaintiff applied to NT Worksafe for reassessment, which referred the matter to a panel - each of the three doctors on the panel separately examined the plaintiff and gave individual WPI assessments, and there was then a consolidated panel assessment of a WPI of 0% - the plaintiff sought judicial review - held: the resolution of this case boiled down to the simple question of who is the statutory decision maker: is it three medical experts each of whom is to form his or her own individual assessment, as NT Worksafe contended. or is it a panel of three medical experts who are to make a decision as a panel? - the statutory context of s72 of the Return to Work Act and the wording of s72(4) in particular, meant that the decision maker entrusted by the legislature with the task of reassessing a complainant's WPI is "a panel of three medical practitioners" and not three medical practitioners acting independently - the question therefore was: is the Panel Report in fact a report of the panel of three medical practitioners to whom the reassessment was referred - the answer to this question was "no" - the Panel Report

purported to be an assessment by the panel, and there was reference to a "consolidated report", but it was not written by reference to the notes of all panel members and there was a basis to conclude that it was not endorsed by two members of the panel - this error was material - where the reassessment has not been made by the panel of three medical experts, then there must be a possibility that a different assessment could have resulted had the reassessment been made by the panel - there was a realistic possibility that a different assessment could have been made if the error had not occurred - order in the nature of certiorari made quashing the Panel Report, and Panel Report declared to be invalid.
Cigobia

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