AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 3 May 2024

Weekly Civil Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

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.

Executive Summary (One Minute Read)

Azimitabar v Commonwealth of Australia (FCAFC) - immigration detention in hotels while receiving medical treatment in Australia was validly authorised under the Migration Act 1958 (Cth) (I B)

Alford v AMP Superannuation Limited (FCA) - approval of the Court granted to discontinue or narrow certain claims in a class action against superannuation trustees (I B)

Commens t/as Subsonic Music v Certain Lloyd's Underwriters subscribing to Policy No ALTCNX1900332 (Trial Judgment) (FCA) - separate questions answered about the construction of an Event Cancellation insurance policy after a musical festival was cancelled due to bushfires (I B)

AIG Australia Ltd v Hanna (NSWCA) - insurer who had voided a policy on the basis of misinformation given by the insured after an accident was liable to indemnify the insured (I B C)

Tasevski v Westpac Banking Corporation (NSWSC) - Workers compensation Appeal Panel had erred in not concluding that there had been no error in a medical assessment (I B)

Henderson v Canterbury Hurlstone Park RSL Club Ltd (NSWSC) - Appeal Panel of Personal Injury Commission had misconstrued cl1.32 of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (I B)

Odelli v Gabrielle (NSWSC) - tenant in common failed to prove trust over the entire property, and trustees for sale should be appointed (I B C)

Trident Austwide Pty Ltd v Bagcorp Pty Ltd as trustee for the Rico Tea Trust (NSWSC) - a retiring minority partner was entitled to its aliquot share of the value of the business, including goodwill, without deduction on the basis of lack of control and lack of marketability of that share (I B)

Box Hill OHP v Whitehorse CC (VSC) - Victorian Civil and Administrative Tribunal had not erred in affirming a refusal by Council to grant a permit for a service station (I B C)

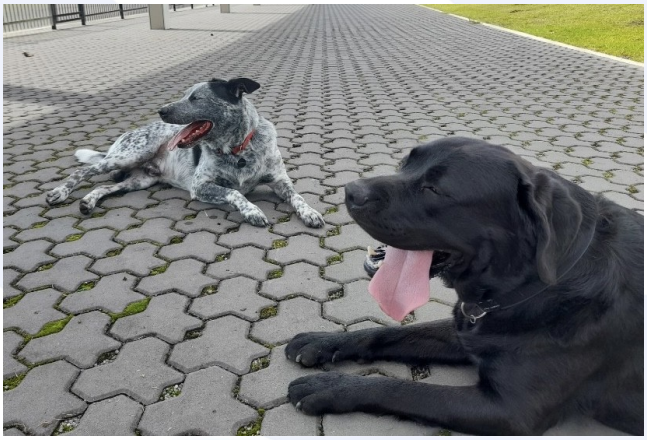
Nasseri v Wellington Builders Pty Ltd & Ors (VSC) - corporate trustee of unit trust controlled by the owner of land was, on a building contract's proper construction, a party to that contract, and was therefore liable under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (I B C)

Manca v Teys Australia Beenleigh Pty Ltd (QCA) - primary judge had not erred in dismissing negligence action brought by abattoir worker against employer after he had slipped on stairs in the blooding floor area (I)

Woods v Northern Territory of Australia (NTSC) - appeal dismissed against judgment of the Work Health Court that an employer had acquitted its liability under the *Return to Work Act 1986* (NT) where there were two alleged injuries (I)

HABEAS CANEM

Panting pooches



Summaries With Link (Five Minute Read)

Azimitabar v Commonwealth of Australia [2024] FCAFC 52
Full Court of the Federal Court of Australia
Rangiah, Anderson, & Button JJ
Migration - appellant was an unauthorised maritime arrival on Christmas Island and was detained there, and then at the regional processing centre on Manus Island, PNG - he was diagnosed with post-traumatic stress disorder and a major depressive episode and was transferred to Australia for medical treatment - during this treatment, he was detained at two hotels in Victoria - he commenced proceedings against the Commonwealth for damages, on the basis that his detention at the hotels had not been validly authorised under the *Migration Act 1958* (Cth) - the primary judge dismissed this claim - the appellant appealed - held: it was not in dispute that, from the appellant's medical transfer to Australia until he was granted a bridging visa, the appellant did not hold a visa to enter or remain in Australia, and was therefore an "unlawful non-citizen" under s14 of the Act, and that it was known or believed by the officers detaining him that he was an unlawful non-citizen - s189(1) of the Act provided that, if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person - the definition of "immigration detention" in s5(1) of the Act includes being held by, or on behalf of, an officer "in another place approved by the Minister in writing" - this definition impliedly conferred power on the Minister to approve "another place" of immigration detention that was a de-facto detention centre - when Parliament explicitly gives a power by a provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power - however, this principle did not mean that the specific grant of power to establish detention centres granted by s273 of the Act meant that the Minister could not create de facto detention centres - the power to create de facto detention centres was delegable under s496(1) - the detention was authorised even if the expenditure involved was not lawfully authorised - close attention must be paid to what renders detention lawful, or unlawful, and identification of some element of illegality associated with detention does not, of itself, render the detention unlawful on the basis that it is no longer "immigration detention" under the Act - appeal dismissed.
Azimitabar (I B)
[From Benchmark Thursday, 2 May 2024]

Alford v AMP Superannuation Limited [2024] FCA 332
Federal Court of Australia
Anderson J
Representative proceedings - applicants began a class action against a number of superannuation funds, the trustees of which were subsidiaries of AMP Life Limited and AMP Services Limited - the claims pleaded were broadly that the trustees allowed fees charged to members to be set by other entities within the AMP Group and that the fees referrable to

administrative services (also provided by entities within the AMP Group) were high compared to those charged by third parties for comparable services in respect of other superannuation funds - the applicants claimed that this amounted to contraventions of the trustees' statutory duties and general law obligations. In relation to the non-trustee respondents, and that other entities were knowingly concerned in, or party to, the trustees' breaches - it became clear that, due to the complexity and nature of the funds, evidence could not be obtained to support a case that a prudent trustee of the funds would have obtained administrative services from a third-party provider or would have negotiated lower fees using the possibility of obtaining such services from a third-party provider as leverage in such negotiations - further, it became clear that closed products or rollover products had complex fee structures which did not lend themselves to the pleaded counterfactual case, and due to the complexity and differentiated nature of those products, evidence could not be obtained to support a case that the relevant administrative services could be obtained from third-party providers or that the fees charged for those products were high relative to competitors - the applicants' counsel therefore expressed the view that the claims lacked reasonable prospects of success and should be withdrawn - the applicants sought the approval of the Court under s33V of the *Federal Court of Australia Act 1976* (Cth) to discontinue certain claims and narrow others - held: the approval of the Court was required both for the discontinuance of the proceedings against certain trustees and for the narrowing of the allegations against other respondents in respect of the closed products or rollover products - the relevant test to apply in determining whether to approve a unilateral discontinuance of claims is whether it is not "unfair, unreasonable, or adverse" to the interests of group members as a whole - the Court agreed with the opinion of counsel expressed in their written opinion that it could not be considered "unfair, unreasonable or adverse" to the interests of group members as a whole for the claims in respect of certain products to be discontinued where the claims lacked reasonable prospects of success.

Alford (I B)

[From Benchmark Wednesday, 1 May 2024]

Commens t/as Subsonic Music v Certain Lloyd's Underwriters subscribing to Policy No ALTCNX1900332 (Trial Judgment) [2024] FCA 434

Federal Court of Australia

Jackman J

Insurance - the 2019 Subsonic music festival was cancelled because of bushfires burning in the Mid North Coast region of NSW - the promoter claimed indemnity pursuant to an Event Cancellation insurance policy - the Court ordered that three questions be determined separately, over the opposition of the insurer: (1) was the cancellation or abandonment (a) necessary; and (b) the sole and direct result of a cause (i) not otherwise excluded by the policy; and (ii) beyond the control of the promoter and the participants, as defined? (2) if not, does s54 of the *Insurance Contracts Act 1984* (Cth) prevent the insurer from refusing to pay the claim? and (3) is the insurer liable to reimburse the promoter for such net loss as may be determined? - held: the rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any

contract, document or statutory provision referred to in the text of the contract) and purpose - in determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean, and that enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract - unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption that the parties intended to produce a commercial result, or put another way, a commercial contract should be construed so as to avoid it making commercial nonsense or working commercial inconvenience - the insuring clause and exclusion clauses must be read together in a harmonious way so that due effect is given to both, and the right conferred by the former is not negated or rendered nugatory by the construction adopted for the latter - the question whether there was a "necessary cancellation" involves both the objective question as to whether the relevant cause made it necessary to decide not to commence with the event, and the subjective question whether that cause was the ground actually used in making that decision - questions answered: the cancellation or abandonment was not necessary, and was not the sole and direct result of a cause not otherwise excluded by the policy and beyond the control of the promoter and the participants - s54 of the *Insurance Contracts Act 1984* (Cth) did not prevent the insurer from refusing to pay the claim - the insurer was not liable to reimburse the promoter for such net loss as may be determined - proceedings dismissed.
Commens t/as Subsonic Music (I B)
[From Benchmark Wednesday, 1 May 2024]

AIG Australia Ltd v Hanna [2024] NSWCA 91
Court of Appeal of New South Wales
Payne, Mitchelmore JJA, & Griffiths AJA
Insurance - a formworker on a construction project was injured when he slipped and fell from a height whilst walking on the scaffolding - he sued Hanna, the builder responsible for the project - Hanna was the named insured under an insurance policy in respect of the project - Hanna admitted to the insurer that, although he was the registered builder on the project, he was helping out a friend who had asked him to give his builder's licence number; and it was his friend who controlled everything on the site - the insurer voided the policy - Hanna cross-claimed against the insurer, seeking damages for an alleged wrongful termination of the policy, and also cross-claimed against the scaffolding company - at trial, Hanna testified that he was the builder in charge of the site, and he had deliberately not told the insurer the truth - the primary judge gave judgment by consent to the formworker, awarded judgement of $430,000 against Hanna, and dismissed the cross-claim against the scaffolding company - the primary judge then found that Hanna was the builder responsible for the project, the policy should have responded, the insurer had wrongfully terminated the policy, entry into the consent judgment activated the insuring claim in the policy, and had been reasonable - the insurer appealed - held: having regard to the manner in which the matter was run before the primary judge, and the prejudice that Hanna would suffer were the matter permitted to be run now, leave was refused

to the insurer to argue on appeal that the primary judge erred in finding that the insurer had wrongfully repudiated the contract of insurance - the primary judge's construction of the insuring clause so that liability determined by a bona fide compromise agreement was within the scope of the indemnity accorded with authority - as to reasonableness, when understood as an inquiry into the reasonableness of the settlement, and not an inquiry into Hanna's liability per se, the primary judge's approach was consistent with authority - appeal dismissed.
View Decision (I B C)
[From Benchmark Tuesday, 30 April 2024]

Tasevski v Westpac Banking Corporation [2024] NSWSC 401
Supreme Court of New South Wales
Schmidt AJ
Workers compensation - Tasevski was employed for many years by Westpac, most recently as a head teller, when she suffered a psychiatric injury at work which resulted in her seeking lump sum compensation under s66 of the *Workers Compensation Act 1987* (NSW) - a medical assessor found that Tasevski had suffered both PTSD and a major depressive disorder from which she had not recovered and which were now chronic, but that her whole person impairment was only 10%, which was below the 20% statutory thresholds for compensation - an Appeal Panel dismissed Tasevski's appeal - Tasevski applied for judicial review - held: there was no issue that the Panel had misunderstood the legal test which it had to apply on the appeal, but whether the result was that the Panel had failed to exercise its statutory functions in accordance with applicable law and had issued a certificate which did not accord with the statutory scheme remained in issue - the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* specify the method which must be used for assessing psychiatric impairment - behavioural consequences of psychiatric disorders must be assessed according to six scales that evaluate separate areas of functional impairment: self care and personal hygiene; social and recreational activities; travel; social functioning (relationships); concentration, persistence and pace; and employability - the assessor had concluded that the self and personal hygiene scale fell into Class 2, whereas, on the evidence, the correct classification was Class 3, the impairment being moderate, not mild - on an appeal where the grounds advanced are application of the wrong criteria or making a demonstrable error in the conclusions reached about the severity of the impairment, the Panel has to consider the assessor's conclusion about the correct class of any disputed scale, by confining itself to the conduct relevant to that scale and the requirements of the Guidelines - even if the Panel identifies that the evidence raised matters about which reasonable minds might differ, it cannot resolve what is in issue about a disputed scale by an observation that what arose to be considered concerned matters about which reasonable minds might differ, or by a finding that the assessor's conclusion was open - the Panel must rather consider and determine whether the assessor applied the incorrect criteria in arriving at his or her conclusion, or whether there was a demonstrable error in the conclusion reached about that class assignment - the Panel had erred, and another panel, approaching the appeal in accordance with applicable law, might reach a different conclusion about the grounds of appeal advanced - Appeal Panel's decision

set aside, and matter remitted to a differently constituted appeal panel to be considered according to law.
View Decision (I B)
[From Benchmark Monday, 29 April 2024]

Henderson v Canterbury Hurlstone Park RSL Club Ltd [2024] NSWSC 473
Supreme Court of New South Wales
Harrison AsJ
Workers compensation - Henderson commenced work with the Canterbury Hurlstone Park RSL Club in 1998, primarily as a marketing assistant/coordinator - from about 2013, she had a new manager, and felt less supported - from 2016, co-workers began behaving inappropriately, with conversations that were often sexual in nature, rough, and involved swearing - she complained, and then felt targeted and excluded - she was accused of doing private work for some of the managers at the club; and suspended, and then asked to enter mediation with the people who had bullied her, and she resigned in 2017 - she sought judicial review a decision of an Appeal Panel in the Personal Injury Commission appointed under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - held: the Psychiatric Impairment Rating Scale ("PIRS") was applicable by virtue of Chapter 11 of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (4th ed) - in the evaluation of permanent impairment resulting from psychiatric injury - the PIRS sets out six categories of behaviour to be assessed, each being divided into five classes - cl1.32 of the *Guidelines* provides that, where the effective long-term treatment of an illness or injury results in apparent substantial or total elimination of the claimant's permanent impairment, but the claimant is likely to revert to the original degree of impairment if treatment is withdrawn, the assessor may increase the percentage of WPI by 1%, 2% or 3%, which should be combined with any other impairment percentage, using the Combined Values Chart - there was no requirement in cl1.32 that an injured worker must demonstrate improvement (due to the effects of treatment) in each and every PIRS category - the Appeal Panel had misconstrued cl1.32 in this respect - the Appeal Panel had also denied procedural fairness by not giving Henderson an opportunity to be heard on the construction of cl1.32 - other grounds of judicial review also considered - Appeal Panel's certificate and reasons set aside, and matter remitted to the President of the Personal Injury Commission of New South Wales for redetermination according to law.
View Decision (I B)
[From Benchmark Tuesday, 30 April 2024]

Odelli v Gabrielle [2024] NSWSC 468
Supreme Court of New South Wales
Parker J
Equity - Gabrielle and a friend acquired an investment property together - the friend died in a boating accident, and the friend's mother ultimately inherited his share - Gabrielle claimed that, after the acquisition of the property, the friend and the friend's parents had had nothing to do with it, and that he (Gabrielle) had arranged for it to be tenanted and had used the rent to pay

the mortgage and other outgoings - the mother had not made any mortgage payments but said she had made payments towards the rates - the mother commenced proceedings by summons against Gabrielle seeking the appointment of trustees for sale under s66G of the *Conveyancing Act 1919* (NSW) - Gabrielle cross-claimed, contending that the mother held her share of the property on trust for him, which he pleaded in several different ways: an express trust; a common intention constructive trust; and a constructive trust based on "unconscientious" use of the legal title - the mother also sought to amend her summons to allege that she held 57% of the property in equity by way of resulting trust - held: the mother should have set out her proposed 57% claim in pleaded form - although it is common for s66G claims to be brought by way of summons, a claim for a declaration of resulting trust rests on equitable doctrines which depend on the factual circumstances in which the property was acquired, and should usually be pleaded where the facts are disputed - allowing the amended claim would also prejudice Gabrielle - mother refused leave to bring the 57% claim - the Court found Gabrielle's evidence unpersuasive - Gabrielle had not proved his claim that the friend contributed only $40,000 to the purchase, and that he did so by way of loan - the claim in trust failed - it was common ground that, if Gabrielle's cross-claim failed, there was no defence to the mother's s66G claim - Gabrielle should be given an opportunity, before the Court made an order for appointment of trustees, to decide whether he wished to advance any claims for adjustment based on improvements made to the property and contribution to expenditure on the property.
View Decision (I B C)
[From Benchmark Tuesday, 30 April 2024]

Trident Austwide Pty Ltd v Bagcorp Pty Ltd as trustee for the Rico Tea Trust [2024] NSWSC 479
Supreme Court of New South Wales
Hmelnitsky J
Partnership - the parties carried on business as partners in the Madura Tea Estates partnership pursuant to the terms of a written agreement - in 2021, Trident retired from the partnership, having first given notice of its intended retirement some months before - the partnership agreement provided that the partnership would not be dissolved by reason only of the retirement of a partner and contained provisions permitting the remaining partners to purchase the retiring partner's interest as of right at a "fair" value, but the remaining partners did not avail themselves of that right, or cause Trident's interest to be offered for sale - Trident claimed to be entitled to an amount calculated by ascertaining the value of the partnership including goodwill as a whole as at the retirement date, and then multiplying that value by its partnership share of 19% - the remaining partners contended that Trident was entitled to the "market value" of its 19% interest as ascertained by a referee appointed by the Court, which the referee had held would include discounts for lack of control and lack of marketability - held: at common law and in the absence of any agreement, the retirement of a partner usually resulted in the general dissolution of the partnership, and the retiring partner's remedy in the absence of agreement was for the assets of the partnership to be brought in and sold, the debts paid off, and the surplus distributed after the taking of partnership accounts - Trident's entitlement on account

must first be ascertained by reference to the partnership agreement - authority generally supports the taking of an account in these circumstances by calculating the outgoing partners aliquot share of the enterprise value as at the date of retirement - the amount to which Trident was entitled from the continuing partners was an amount equal to its share of the value of the enterprise as a whole as if on a taking of accounts as at that date of retirement, and not simply the amount for which its partnership interest might have been sold to a willing but not anxious purchaser on that date - the remaining partners' reliance on certain authority was misconceived, as Trident was not seeking to sell its partnership interest to anybody, and the "substance of the transaction" was not a sale of its interest to the remaining partners, but, rather, Trident was seeking payment of its entitlement on retirement - this did not involve any unfairness to the continuing partners, as they had had a contractual right to acquire Trident's partnership interest for fair value, which they had declined - the Court adopted the referee's report in its entirety, but that did not mean that it accepted the referee's conclusion as to the market value of Trident's interest - the report allowed the Court to conclude that the amount due to Trident on a proper basis was a particular amount.
View Decision (I B)
[From Benchmark Thursday, 2 May 2024]

Box Hill OHP v Whitehorse CC [2024] VSC 199
Supreme Court of Victoria
Watson J
Planning law - OHP applied to Whitehorse City Council for a permit for a proposed service station - Council refused the application - OHP filed an application for review of the Council's decision with the Victorian Civil and Administrative Tribunal, which affirmed Council's decision to reject OHP's application and determined that no permit should be issued for the proposed service station - OHP sought leave to appeal from the Tribunal's decision - held: the prospects of the appeal were real and not fanciful, so the Court would grant leave to appeal - under the *Whitehorse Planning Scheme*, the land as in a residential growth zone and also in a substantial change area - in determining whether the Tribunal had made an error of law, the weight to be given to the various considerations which may be relevant on the one hand, and to particular facts bearing on those considerations on the other hand, is not fixed by the planning scheme but is essentially a matter for the decision maker - for a residential growth zone and a substantial change area the planning policy provides relatively more encouragement for housing use and less encouragement for a service station - when regard was had to the totality of the Tribunal's reasons, the better characterisation of the Tribunal's decision was that it permissibly gave weight to the policy objectives of the *Whitehorse Planning Scheme* and its prioritisation and encouragement for increased density of housing use in the area in which the land is situated as part of an overall weighing of the various factors which were relevant on the application for the permit - the Tribunal's finding was not legally unreasonable having regard to the Tribunal's other findings regarding the proposed service station use - the Tribunal had not impermissibly treated the service station proposal's consistency with 'the planning policy and strategic vision' as a threshold issue prior to and without regard to its amenity impacts - the

Tribunal had not failed to consider whether a service station was an 'acceptable' outcome under the planning scheme, and had not impermissibly considered the application by reference to an ideal or optimal use, being higher density housing - the Tribunal had not fallen into any error of law - leave to appeal granted but appeal dismissed.
Box Hill OHP (I B C)
[From Benchmark Thursday, 2 May 2024]

Nasseri v Wellington Builders Pty Ltd & Ors [2024] VSC 200
Supreme Court of Victoria
Garde J
Building and construction contracts - the plaintiff signed a MOU and then a development management agreement with a property developer - the parties in due course fell into dispute - the builder made a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in the amount of about $150,000 for completing the base stage of the project - the plaintiff did not provide a payment schedule - an adjudicator found that the works were at base stage when the payment claim was made, and determined that about $160,000 was payable to the builder with an applicable rate of interest of 10% per annum - the plaintiff sought judicial review of the adjudicator's determination - held: identification of the parties to a contract must be in accordance with the objective theory of contract - when consideration was given to the text of the contract, the surrounding circumstances known to the parties, and the purpose and object of the parties, it was plain that the parties intended that the corporate trustee of a unit trust associated with the plaintiff to be a party to the contract - the handwritten changes to the contract and appendix to the contract made it clear that the parties intended that the unit trust have an important role under the contract and be subject to the rights and liabilities set out in its provisions - the plaintiff signed the contract because she was the landowner and this was entirely consistent with the parties' intention that the corporate trustee be a party to the contract - the post-contractual conduct of the parties overwhelmingly and compellingly pointed to the same conclusion - the contract was not void *ab initio* under s31(2) of the *Domestic Building Contracts Act 1995* (Vic) for want of signature by the building owner or authorised agent, as the plaintiff should be taken to have signed both in her own right as owner, and as authorised agent of the corporate trustee - the adjudicator had plainly correct when he treated the plaintiff and the corporate trustee as the respondents to the adjudication application - the adjudicator also had not erred in concluding that the plaintiff was 'in the business of building residences' within the meaning of s7(2)(b) of the *Building and Construction Industry Security of Payment Act* - where jurisdiction depends on a matter of fact, the Court determines the question of fact for itself on the evidence placed before it, the burden of establishing the facts which show an absence of jurisdiction always rests of the party applying for relief, and the standard of proof is high, requiring clear proof leading unmistakably to the conclusion that there was an excess of jurisdiction - the plaintiff and the builder were a commercial syndicate working together to achieve a profit-making objective, and both were in the business of building residences - the plaintiff's profit making intention could be ascribed also to the corporate trustee of the unit trust which was under her control - proceedings dismissed.

Nasseri (I B C)
[From Benchmark Friday, 3 May 2024]

Manca v Teys Australia Beenleigh Pty Ltd [2024] QCA 60
Court of Appeal of Queensland
Bowskill CJ, Fraser AJA, & Applegarth J
Negligence - the appellant worked on a part of the "kill floor" at Teys' Beenleigh meatworks, where his work was slicing meat to remove fat and using a saw to cut briskets - he was transferred to do different work in a different environment on "the blooding floor" - the slipped while walking down stairs and was injured - he sued Teys in negligence - the primary judge found that Teys had taken reasonable steps to mitigate any risk that a person would slip on the steps, and that the appellant had not proven that he slipped due to any failure by Teys to take reasonable precautions against a risk of slipping, and therefore dismissed the proceeding - the appellant appealed - held: it had been open to the primary judge to conclude that the appellant had not proven that there was blood on the step or steps and that the blood caused him to slip - the appellant had not established that the primary judge erred in his findings that there was no blood on the appellant's boots when he fell - given the course of evidence at trial, the Court was not persuaded that there was a breach of the principles in *Browne v Dunn*, or that the primary judge was not entitled to act upon the evidence of witnesses called in Teys' case about congealed blood and whether blood is slippery or not - the evidence did not prove that any supervisor had seen the appellant carrying his tools in both hands as he descended the stairs on one of the few days that he worked in the blooding floor area before his fall - the primary judge had been correct to conclude in the light of his findings of fact that the precautions he had noted meant the risk of a person being injured by slipping on the steps was insignificant - the primary judge's conclusion that the risk was "not significant" had not been shown to be in error - the primary judge had not been shown to have erred in his assessment of whether, in the circumstances, a reasonable person in Teys' position would have taken the pleaded precautions - the appellant had not shown that the primary judge had erred in concluding that it was not clear what caused the appellant to slip and fall and that, therefore, the appellant had not proved that he slipped due to any failure by Teys to take reasonable precautions against the risk of slipping - the appellant had failed to prove that any one of the causes that he alleged was the cause of his fall, and he had therefore failed to prove causation - appeal dismissed.
Manca (I)
[From Benchmark Monday, 29 April 2024]

Woods v Northern Territory of Australia [2024] NTSC 35
Supreme Court of the Northern Territory
Riley AJ
Workers compensation - Woods worked as a school teacher with the Northern Territory Department of Education at two schools - she claimed that, in the course of her employment, she was exposed to traumatic and violent interactions with students which substantially contributed to her sustaining psychological injuries - the primary judge in the Work Health Court

decided that the Northern Territory had paid permanent impairment compensation to Woods in relation to both the first injury and the second injury prior to the commencement of the proceedings and therefore had acquitted its liability under the *Return to Work Act 1986* (NT) in relation to the appellant's entitlement to compensation for whole person impairment - Woods appealed on questions of law under s116 of the *Return to Work Act* - held: the relevant objects of the Act were expressed to include providing effective compensation for injured workers and ensuring that the compensation of such workers is fair and affordable and also that adequate and just compensation be provided - while proof of a compensable injury is a matter for the Court, the question of compensation for permanent impairment is largely determined by extra-curial administrative procedures and the operation of the statute - once liability has been established by determination of the Court or where the employer has accepted liability, an entitlement to compensation exists and the amount payable will be calculated in accordance with the requirements of s71 by reference to the level of permanent impairment and that, in turn, will be assessed according to the requirements of the Act and the *Northern Territory Guidelines for the Evaluation of Permanent Impairment* - the psychiatrist treated the condition of the appellant as requiring assessment of the appellant's total impairment with the source of that impairment being from two separate injuries with levels of causation being allocated in the manner he described - in so doing, he was proceeding in accordance with the requirements of the Guidelines and, in particular, the Guidelines relating to the existence of a pre-existing condition or injury and how that should be addressed - neither the Act nor the Guidelines refer to, or distinguish between, injuries incurred whilst employed by different employers - rather, they refer to permanent impairment caused by an injury and allow for deductions for previous injuries or conditions to ensure double compensation does not occur - whether one impairment or more than one impairment arose out of two or more incidents considered in a medical sense, the legislative provisions applicable for the purposes of calculating compensation require that the matter proceed in accordance with the Act and Guidelines - appeal dismissed.
Woods (I)
[From Benchmark Wednesday, 1 May 2024]

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13
Supreme Court of the United Kingdom
Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler
AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the

public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.
R v Secretary of State for the Home Department

Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd,* (1874) and *Tess of the d'Urbervilles,* (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Novel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds

today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, https://www.hardysociety.org/.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern
https://www.youtube.com/watch?v=Q1qo8sWTi6M

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