



Friday, 9 May 2025

Weekly Criminal Law

A Weekly Bulletin listing Decisions
of Superior Courts of Australia covering criminal

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Executive Summary

Brawn v The King (HCA) - where there is error or irregularity in a criminal trial, to establish a miscarriage of justice the appellant only need show that the error or irregularity could realistically have affected the reasoning of the jury to its verdict

Hu v R (NSWCCA) - patient is 'under the authority of' a treating health care professional for purposes of aggravation - primary judge did not err in admitting tendency evidence in trial of osteopath for sexual offending against patients



HABEAS CANEM

New puppy - 2018

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Summaries With Link (Five Minute Read)

Brawn v The King [2025] HCA 20

High Court of Australia

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

Criminal law - appellant found guilty by jury of maintaining an unlawful sexual relationship with a child under 17 years - complainant was girl aged between 5 and 8 years during the offending period - principle issue was whether perpetrator was the appellant or another adult member of complainant's community - SA Court of Appeal held prosecution had breached common law duty by not disclosing appellant's father had been charged with unlawful sexual acts against a minor during a period overlapping with the offending in this case - however, Court of Appeal held there had been no miscarriage of justice because the appellant had not shown his defence either 'would' or 'might' have been conducted differently - appellant granted special leave to appeal to High Court - held (in unanimous joint reasons for judgment): Court of Appeal erred to the extent it required appellant to show his defence *would* have been conducted differently but for the breach of the duty of disclosure - where there is error or irregularity in a criminal trial, to establish a miscarriage of justice the appellant only need show that the error or irregularity could realistically have affected the reasoning of the jury to its verdict - without the required disclosure, defence case did not seek to elevate appellant's father as a possible perpetrator beyond any other member of the ill-defined class of male members of the complainant's community - appellant was denied the opportunity to conduct a case that was different from the case that was run, and that difference could realistically have affected the reasoning of the jury - miscarriage of justice established - appeal allowed and new trial ordered.

[Brawn](#)

Hu v R [2025] NSWCCA 66

Court of Criminal Appeal of New South Wales

Davies, Wright, & Sweeney

Tendency evidence - applicant was osteopath found guilty by jury of aggravated indecent assault of patient and aggravated sexual intercourse without consent in relation to another patient - jury unable to reach verdict on two counts of aggravated sexual touching without consent of other patients - asserted aggravation was complainants 'under the authority' of applicant - judge held tendency evidence admissible and rejected application for separate trials - applicant sought leave to appeal against conviction - held: on proper construction of s61H(2) of the *Crimes Act 1900* (NSW), each of the three elements (being in the care of a person; being under the supervision of a person; and being under the authority of a person) operate independently in determining whether someone is 'under the authority of another person' - a patient is 'in the care of' and thus 'under the authority of' a treating health care professional for purposes of aggravation - trial judge's direction in this respect not erroneous - significant similarity between the conduct and circumstances evidencing the tendency and each relevant offence - tendency evidence had significant probative value - no substantial risk jury would use the tendency evidence improperly in some unfair way - evidence in respect of each count was



cross admissible as tendency evidence in respect of each other count - trial judge's direction regarding tendency not in accordance with *DPP v Roder* [2024] HCA 15 and *JS v R* [2022] NSWCCA 145 - however, when direction considered as a whole, unlikely that jury would have been deflected from proper task on basis direction erroneously focused attention on whether the tendency evidence established the conduct rather than the asserted tendency - direction adequately emphasised the tendency evidence relied on to establish the tendency asserted and, if that tendency were established, this would not by itself establish any of the alleged conduct - leave to appeal granted in respect of certain grounds, but appeal dismissed.

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Mousse v Commission Nationale de L'Informatique et des Libertes (CNIL), SNCF Connect (EUCJ1C) - The practice of the French national railway SNCF of requiring online ticket purchasers to indicate their title as either Monsieur (Mr) or Madame (Ms) was in violation of the *European Union General Data Protection Regulation* (GDPR) because the collection of this information was not necessary for the performance of the contract for passenger travel and violated the principle of minimisation of data collection

Summaries With Link (Five Minute Read)

Mousse v Commission Nationale de L'Informatique et des Libertes (CNIL), SNCF Connect, Case C-394/23

European Court of Justice

Lenaerts P, von Danwitz VP, Arastey Sahún, Kumin, & Ziemele JJ

When purchasing a ticket online, patrons of the French national rail, the SNCF, were required to tick a box designating gender identity: either Monsieur or Madame. Arguing that this practice violated the *European Union General Data Protection Regulation* (GDPR), Mousse, an association, filed a complaint with the French data protection authority - the Commission Nationale de L'Informatique et des Libertes (CNIL). After the CNIL rejected the claim, Mousse brought an action before the highest administrative body in France, the Council of State, to have the CNIL determination annulled. In response, the Council of State referred the matter to the European Court of Justice for a preliminary ruling. Under the GDPR, data collection must be limited to what is necessary for the performance of a contract and the legitimate interests of the party collecting the data (the data controller). Here, the SNCF argued that it collected the data because it facilitated personal communication with ticket purchasers. The European Court disagreed with the SNCF, and stated that the collection of personal data must be objectively indispensable in order to enable the proper performance of the contract or necessary for the legitimate interests of the data collector. The Court found that personalisation of commercial communications based on gender as indicated in a purchaser's title did not appear to be objectively indispensable to enable the proper performance of rail transportation. Nor was the data strictly necessary for the legitimate interests of the SNCF. The Court found that the SNCF could instead communicate with patrons by means of generic expressions that have no correlation with gender identity. Under EU law, the matter now reverts to the French Council of State to dispose of the matter in accord with the decision made by the European Court of Justice.

[Mousse](#)



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Poem for Friday

Warm Summer Sun

By Mark Twain (1835-1910)

Warm summer sun,
Shine kindly here,
Warm southern wind,
Blow softly here.
Green sod above,
Lie light, lie light.
Good night, dear heart,
Good night, good night.

Mark Twain, was the pen name of American writer and essayist Samuel Langhorne Clemens. Clemens was born in Florida, Missouri, on 30 November 1835, the sixth of seven children, only four of whom survived into adulthood. His father was a lawyer. Clemens was raised in Hannibal, Missouri. His father, by then a Judge, died when Clemens was 11 years old. After leaving school at age 11 he was an apprentice typesetter to a printer, writing articles, and educating himself in the evening in the public libraries in the cities he lived in. He was later a riverboat pilot, and then a miner for Orion in Nevada. Through his wife Olivia Langdon, Twain became friends with Frederick Douglass, Harriet Beecher Stowe, and William Dean Howells. He part-owned the Buffalo Express. He had a love of science, but lost substantial sums investing in new inventions. Mark Twain's famous novels included the *Adventures of Tom Sawyer* and the *Adventures of Huckleberry Finn*. Ernest Hemingway wrote that "*All modern American literature comes from one book by Mark Twain called Huckleberry Finn*". Mark Twain suffered a deep depression after his son Langdon died at 19 months, in 1872, and then his daughter Susy died in 1896, wife Olivia died in 1904, daughter Jean died on Christmas Eve 1909, and his good friend Henry Rogers died on 20 May 1909. Mark Twain died at the age of 74, on 21 April 1910 of a heart attack. Halley's Comet had passed the earth in the year of his birth in 1835, and passed the earth again in the year of his death in 1910. Mark Twain has been called "*The father of American Literature*".

Mark Twain's very quotable observations include:

"Only two things we'll regret on deathbed – that we are a little loved and little travelled."

"Twenty years from now you will be more disappointed by the things you didn't do than by the ones that you did do"

"Man is the only animal that blushes. Or Needs to."

"A full belly is little worth where the mind is starved."



"Travel is fatal to prejudice"

"The secret of getting ahead is getting started"

"Always do right, it will gratify some people and astonish the rest,"

"Kindness is the language which the deaf can hear and the blind can see"

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