



Friday, 30 August 2024

## Weekly Criminal Law

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

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### Executive Summary

**Stenner-Wall v R** (NSWDC) - costs certificate granted where a complainant had refused to container her evidence, as the fact that the complainant would do so was a “relevant fact” assumed to be known by the prosecution when deciding whether to commence proceedings, which rendered the decision to commence proceedings unreasonable

**R v Fortuna** (NSWDC) - an electric bike was a “vehicle” but not a “motor vehicle” under the *Road Transport Act 2013* (NSW), and therefore the criminal prohibition against drink driving applied, but the mandatory interlock provisions did not

## HABEAS CANEM

### McGregor the puppy



# Benchmark

## Summaries With Link (Five Minute Read)

### **Stenner-Wall v R [2024] NSWDC 365**

District Court of New South Wales

Wass SC DCJ

Costs - the applicant plead not guilty to a number of counts of sexual assault against a complainant; during the complainant's cross-examination, she refused to give further evidence - the Crown directed that there be no further proceedings in respect of the counts to which the applicant had pled not guilty - the applicant sought a certificate pursuant to s2 of the *Costs in Criminal Cases Act 1967* (NSW) - held: a certificate may be granted where the Court considers that: (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts it would not have been reasonable to institute the proceedings; and (b) that any contribution to the commencement of the proceedings by the defendant was reasonable in the circumstances - only (a) was in issue here - the question was whether the refusal of the complainant to continue her cross-examination was a "relevant fact" for the purposes of (a) - the Crown case depended on any jury accepting the complainant beyond reasonable - the complainant was always a reluctant witness because: she did not originally complain to police, but rather her mother complained; she was initially reluctant to proceed with any allegations, and there was a period of delay in her reporting the alleged assaults; she had failed to attend two police interview appointments; and she had signed a statement stating that she did not wish to be interviewed and did not require an AVO for her protection - there was no question that the complainant's conduct at trial rendered her an utterly incredible and unreliable witness - caselaw showed that, while matters of judgment concerning credibility, demeanour, and the like" may not be sufficient in some cases, they can be considered as "relevant facts" in an appropriate case - the refusal of the complainant to give evidence was a "relevant fact", knowledge of which could be imputed to the prosecution - a refusal of a witness to be questioned is not "a matter of judgment concerning credibility", but is rather a fact that renders the witness entirely incredible - the complainant here had failed to "come up to proof" in a most serious way - the Director was assumed to know that the complainant would refuse to submit to cross-examination, which would render her utterly devoid of any credit as a reliable and honest witness no matter what reason could be divined for her departure - given all the relevant facts, assumed to be known by the hypothetical prosecutor, it had been unreasonable to initiate the proceedings - costs certificate granted.

[View Decision](#)

### **R v Fortuna [2024] NSWDC 328**

District Court of New South Wales

Anderson SC DCJ

Driving offences - Fortuna was riding an electric bike south in the designated bike lane on the Sydney Harbour Bridge when he lost control and slammed into the bridge fencing and fell to the concrete, sustaining serious head injuries - he returned a reading of 0.152 grams of alcohol in 100 millilitres of blood, which was in the high range - he pled guilty to one charge under

s112(1)(a) of the *Road Transport Act 2013* (NSW), driving a vehicle under the influence of alcohol - he was disqualified from driving for 12 months and fined \$600, and the Magistrate also imposed an interlock driver licence condition for 24 months - he appealed against sentence, specifically regarding the interlock condition - held: s112 specifically refers to "drive a vehicle", and the definition of vehicle in s4 includes "any description of vehicle on wheels" - an E bike was therefore a vehicle - the question was whether an Ebike is also a "motor vehicle", in which case the mandatory interlock orders in s209 would become engaged - a motor vehicle is defined in s4 as " a vehicle that is built to be propelled by a motor that forms part of the vehicle" - like a normal bike, the E bike Fortuna had been riding could only be propelled by pedalling, and it had no throttle and the motor would not work unless the rider were actually peddling, and the pedal assist cuts out at 25km/h - in a personal injury case, the Personal Injury Commission had held that a more powerful E bike than Fortuna's was not a "motor vehicle" as defined by the *Motor Accident Injuries Act 2017* (NSW) - there was no motor forming part of Fortuna's E bike that resulted in its propulsion unless power were also generated by someone pushing its pedals - its propulsion was not the result of a motor alone, but combined with human activity - the Ebike was not a "motor vehicle" within the meaning of s209, and the mandatory interlock provisions did not apply - appeal allowed, disqualification and fine confirmed, but a note made that there was to be no application of the Act with respect to an interlock.

[View Decision](#)

# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Manchester Ship Canal Co v United Utilities Water Ltd (UKSC)** - Manchester Ship Canal company was not barred from bringing a common law damages claim for trespass and nuisance against a public utilities company that discharged raw, untreated and foul sewage into the canal from outfalls lawfully maintained by the sewerage authority

### Summaries With Link (Five Minute Read)

**Manchester Ship Canal Co v United Utilities Water Ltd [2024] UKSC 22**

Supreme Court of the United Kingdom

Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Burrows, Lord Stephens, Lady Rose, Lord Richards

In a declaratory ruling, the Supreme Court was asked to decide whether the Manchester Ship Canal Company could bring a claim against the statutory sewerage authority for discharges of foul sewage into the canal. The defendant, United Utilities, was the statutory sewerage authority for North West England and owned about 100 outfalls from which treated sewage was discharged into the canal. However, sometimes untreated sewage was discharged into the canal as well. No allegation was made that the discharge of untreated sewage was caused by negligence. However, it could have been avoided through improved infrastructure. The High Court, upheld by the Court of Appeal, found that a canal owner could not bring a claim based on nuisance or trespass against a sewerage operator unless the discharge was the result of negligence or deliberate wrongdoing. The Supreme Court unanimously allowed the Canal Company's appeal. Sewerage is regulated by the *Water Industry Act 1991* and the Supreme Court held that nothing in the legislation permitted or authorised a sewerage authority to discharge foul water through outfalls. Inasmuch as the statute did not authorise the activity, common law remedies were available. The Court rejected the defence that the only way to avoid fouling the canal would be to construct sewerage infrastructure and that was a matter for Parliament. The Court found that there was nothing in the legislation indicating that Parliament intended to extinguish common law rights of action. While an injunction against further discharge presented questions relating to the process of regulatory approval for capital expenditures by the sewerage authority, that did not mean that common law-based awards for damages for invasion of property rights were precluded.

[Manchester Ship Canal Co](#)

## Poem for Friday

**i carry your heart with me**

**by e.e. cummings (1894-1962)**

i carry your heart with me (i carry it in  
my heart) i am never without it (anywhere  
i go you go, my dear; and whatever is done  
by only me is your doing, my darling)

i fear

no fate (for you are my fate, my sweet) i want  
no world (for beautiful you are my world, my true)  
and it's you are whatever a moon has always meant  
and whatever a sun will always sing is you

here is the deepest secret nobody knows  
(here is the root of the root and the bud of the bud  
and the sky of the sky of a tree called life; which grows  
higher than soul can hope or mind can hide)  
and this is the wonder that's keeping the stars apart

i carry your heart (i carry it in my heart)

**Edward Estlin Cummings (e.e. cummings)**, an American poet, essayist and playwright was born on 14 October 1894 in Cambridge Massachusetts. His parents encouraged his creativity, and included in their circle of friends artists, philosophers and writers. Cummings's father was a professor at Harvard, and later a minister of the Unitarian church. Cummings wrote poetry from the age of 8. Cummings was an ambulance driver during the first world war. He was interned in a camp in Normandy in the first world war, for having expressed anti-war sentiments. During his life he wrote about 2900 poems. He returned to Paris many times throughout his life. It has been written of Cummings that "No one else has ever made avant-garde, experimental poems so attractive to the general and the special reader," and "Cummings is a daringly original poet, with more vitality and more sheer, uncompromising talent than any other living American writer."

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian parents. He trained at the Royal Central School of Speech and Drama in London. In the



UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: [https://en.wikipedia.org/wiki/Patricia\\_Conolly](https://en.wikipedia.org/wiki/Patricia_Conolly) and <https://trove.nla.gov.au/newspaper/article/47250992>.

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