

Friday, 15 December 2023

## Weekly Defamation Law

### A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Defamation Law

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#### Executive Summary (One Minute Read)

**Lehrmann v Network Ten Pty Limited (Covert Recording)** (FCA) - s10 of the *Listening Devices Act 1992* (ACT) is not picked up by s79 of the *Judiciary Act 1903* (Cth), and so covertly recorded conversations were admissible

## HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season





## Summaries With Link (Five Minute Read)

### **Lehrmann v Network Ten Pty Limited (Covert Recording) [2023] FCA 1586**

Federal Court of Australia

Lee J

Evidence - the plaintiff was accused of sexual assault, and the brought proceedings against Network Ten and Wilkinson - Ten and Wilkinson called Higgins, the alleged victim, as their first witness in pursuit of a substantial truth defence - during the cross-examination of Higgins, counsel for Lehrmann sought to play an audio recording secretly made by Higgins of a conversation between a Senator, Higgins, and the Senator's chief of staff, made after she had started engaging with Network Ten to make allegations of rape and obstruction - another witness under cross-examination was taken to a series of messages he exchanged with Higgins' fiancé and it appeared the fiancé had sent this witness a secretly made recording of another telephone recording with the Senator's chief of staff - Senior Counsel of Lehrmann proposed to play both recordings in open Court, cross-examine on them, and tender them in Lehrmann's case - Senior Counsel for Network Ten raised concerns about the prohibition of s10 of the *Listening Devices Act 1992* (ACT) against leading evidence of a private conversation that has come to the knowledge of as a result of the use of a listening device in contravention of the Act - held: the matter currently before the Court was wholly in federal jurisdiction, and was also within the subject matter of the Court as s9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) had the effect of conferring upon the Federal Court original jurisdiction over a proceeding that would fall within the jurisdiction of the Supreme Court of the Australian Capital Territory or the Supreme Court of the Northern Territory - in quelling the justiciable controversy in federal jurisdiction, the Court was required to apply the statutory law of the Commonwealth, any "surrogate" federal law picked up by s79 of the *Judiciary Act 1903* (Cth) (in this case, any applicable state and territory laws), and the common law of Australia - state and territory Parliaments lack the power to regulate the exercise of federal jurisdiction or command a federal court in the exercise of its jurisdiction - in determining whether a state or territory law purports to regulate the issue of federal jurisdiction, it is relevant to ask whether the impugned law operates independently of anything done by a court - the categories of laws identified in s 79(1) of the *Judiciary Act*, such as whether a law is a law of evidence, are of assistance in identifying whether a state or territory law purports to regulate the exercise of federal jurisdiction - s10 of the *Listening Devices Act* purports to regulate the exercise of federal jurisdiction - s10 of the *Listening Devices Act* was directly and logically inconsistent with s56(1) of the *Evidence Act 1995* (Cth), which provides that, except as otherwise provided by that Act, evidence that is relevant in a proceeding is admissible in the proceeding - s56(1) was therefore a law of the Commonwealth which "otherwise provided" within the meaning of s79(1) of the *Judiciary Act* - s10 of the *Listening Devices Act* was therefore deprived of any direct operation - the recordings were admitted, subject to a limitation under s136 of the *Evidence Act* that, insofar as the recordings contain representations of the Senator and her chief of staff, their use be limited such that the recordings are not evidence of the underlying truth of the representations made by the senator and her chief of staff.

# Benchmark



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[Lehrmann](#)

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# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Minnesota v Torgerson** (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

### Summaries With Link (Five Minute Read)

**Minnesota v Torgerson 995 N.W.2d 164 (2023)**

Supreme Court of Minnesota

Gildea CJ, Anderson, & McKeig JJ

A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.

[Minnesota](#)





## Poem for Friday

### **In Memoriam, (Ring out, wild bells)**

**By:** Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,  
The flying cloud, the frosty light:  
The year is dying in the night;  
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,  
Ring, happy bells, across the snow:  
The year is going, let him go;  
Ring out the false, ring in the true.

Ring out the grief that saps the mind  
For those that here we see no more;  
Ring out the feud of rich and poor,  
Ring in redress to all mankind.

Ring out a slowly dying cause,  
And ancient forms of party strife;  
Ring in the nobler modes of life,  
With sweeter manners, purer laws.

Ring out the want, the care, the sin,  
The faithless coldness of the times;  
Ring out, ring out my mournful rhymes  
But ring the fuller minstrel in.

Ring out false pride in place and blood,  
The civic slander and the spite;  
Ring in the love of truth and right,  
Ring in the common love of good.

Ring out old shapes of foul disease;  
Ring out the narrowing lust of gold;  
Ring out the thousand wars of old,  
Ring in the thousand years of peace.

Ring in the valiant man and free,



The larger heart, the kindlier hand;  
Ring out the darkness of the land,  
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam*, written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells*, has been set to music including by Charles Gounod and Percy Fletcher. Alfred, Lord Tennyson died on 6 October 1892.

**Ring Out, Wild Bells**, Gounod, sung by the Mormon Tabernacle Choir  
[https://www.youtube.com/watch?v=TVEAt8v7b\\_g](https://www.youtube.com/watch?v=TVEAt8v7b_g)

**Ring Out, Wild Bells**, from The Passing of the Year by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club  
<https://www.youtube.com/watch?v=yPlqqvOM8Og>

Bell Ringing in the Belfry at Great St. Mary's, Cambridge  
<https://www.youtube.com/watch?v=KNMFvNZIsCM>

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