



Friday, 25 October 2024

## Weekly Defamation Law

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

#### Search Engine

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#### Executive Summary (One Minute Read)

**Lehrmann v Network Ten Pty Limited (FCA)** - Court declined to order security for costs of an appeal, and stayed the first instance costs order against the appellant pending resolution of the appeal

**Agusa v Hunter (WASC)** - WA defamation proceedings in which the law of NSW applied - the requirement to give a concerns notice pursuant to s12B of the *Defamation Act 2005* (NSW) was a substantive law, and thus part of the law applicable to the proceedings - proceedings dismissed for failure to give a concerns notice

## HABEAS CANEM

### Habeus Halloween



# Benchmark

## Summaries With Link (Five Minute Read)

### **Lehrmann v Network Ten Pty Limited [2024] FCA 1226**

Federal Court of Australia

Abraham J

Security for costs in defamation appeals - the appellant was accused of sexual assault on Network Ten's program The Project, and sued Ten and a journalist employed by Ten in defamation - the Court dismissed the proceedings (see Benchmark 16 April 2024) - the appellant appealed - the respondents sought an order that the appellant provide security for the respondents' costs of the appeal in the amount of \$200,000 - the appellant sought to stay the costs order made by the primary judge that he pay \$2million in costs to the first respondent (see Benchmark 3 July 2024) - held: the power to order security is discretionary and has been described as "broad", and is to be exercised in light of the facts and circumstances of the particular case - there was no dispute that the appellant was impecunious - the appellant was a natural person - the respondents accepted that an order for security would likely stultify the appeal - the respondents accepted there were grounds of appeal that were at least arguable - the Court could not consider the merits of the appeal on the scant materials before it - the Court did not accept the respondents' submissions that there was no public interest, in the relevant sense, in the appeal - the appellant had a right to appeal - an order for security for costs should not be made - the discretion to stay the costs order was also broad, and requires consideration of whether an appeal is at least arguable and the balance of convenience - the successful party at first instance is entitled to presume that the judgment appealed from is correct - the respondents had accepted that there were arguable grounds of appeal - in the circumstances where the appellant was impecunious and did not have the money to pay the costs order, it was unclear what the prejudice to the respondents would be if the costs order were stayed pending the appeal - if the costs order were not stayed, the appellant would be declared bankrupt, which would likely affect his prosecution of the appeal - the balance of convenience favoured the appellant - costs order stayed.

[Lehrmann](#)

[From Benchmark Friday, 25 October 2024]

### **Agusa v Hunter [2024] WASC 380**

Supreme Court of Western Australia

Tottle J

Defamation - the plaintiff commenced proceedings in the WA Supreme Court, contending the defendants defamed her in emails published to a third party located in NSW - the defendants applied for the proceedings to be dismissed because the plaintiff did not give a concerns notice before commencing the proceedings as was required by s12B of the *Defamation Act 2005* (NSW) - held: the application did not present a choice of law issue - it was common ground that the substantive law applicable to the proceedings was the law of NSW, pursuant to s11(1) of the *Defamation Act 2005* (WA), as the publication occurred wholly within NSW - the issue was whether the requirement to give a concerns notice pursuant to s12B of the NSW Act was a

procedural law (and therefore not part of the applicable law) or a substantive law (and thus part of the applicable law) - although the dividing line between substantive law and procedural law is sometimes doubtful or even artificial, the need to distinguish between them is clearly recognised for a number of forensic purposes - in the leading case of *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503, the High Court had recognised that limitation periods were substantive law, as were all questions about the kinds of damage, or amount of damages, that may be recovered - in *Peros v Nationwide News Pty Ltd* [2024] QSC 80, a judge of the Queensland Supreme Court had characterised s12B of the *Defamation Act 2005* (Qld) (which was relevantly identical to s12B of the NSW Act) as a procedural provision (see Benchmark 13 June 2024) - the existence of the reasonable offer to make amends defence in s18 of the NSW Act was a matter that distinguishes Part 3 of the NSW Act from legislative regimes considered in earlier cases, such as the *Personal Injuries Proceedings Act 2002* (Qld) - the s18 defence is more than part of the machinery of litigation, and is instead a substantive right that can defeat the plaintiff's claim - the availability of the s18 defence depends upon the giving of a concerns notice under s12B - the Court disagreed with the Queensland Supreme Court in *Peros* in this respect - the significance of the reasonable offer to make amends defence could not be diminished on the basis that the circumstances in which publishers may be deprived of the defence are exceptional or rare - s12B was a substantive provision - proceedings dismissed for failure to serve a concerns notice.

[Agusa](#)

[From Benchmark Friday, 25 October 2024]

# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**In the Matter of McAleenon (UKSC)** - Supreme Court held that an individual had the right to compel judicial review of a government decision relating to landfill contamination even though a private right of action against the alleged polluter may have been available

### Summaries With Link (Five Minute Read)

**In the Matter of McAleenon [2024] UKSC 31**

Supreme Court of the United Kingdom

Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Stephens, & Lady Simler

Noeleen McAleenon resided near a landfill that was operated by a private firm. Ms McAleenon maintained that the Lisburn and Castlereagh Council had regulatory authority concerning nuisances like the landfill. She sought judicial review of how the Council had dealt with complaints about the landfill. The government argued that she could not seek judicial review of the Council's actions because she had available to her a private right of action against the alleged polluter. The Court of Appeal sustained this objection and held that there were suitable alternative remedies available to Ms McAleenon and that judicial review was not available to her. The Supreme Court reversed and found that the existence of a private claim in nuisance against the alleged polluter did not constitute a suitable alternative remedy to judicial review of the Council's conduct. The Court stated that the fact that different proceedings could have been brought against another party did not mean that there existed a suitable alternative so as to preclude judicial review. The Court further stated that it is not the courts' role to say that a claimant should have sued someone other than the branch of government whose actions were being questioned.

[In the Matter of McAleenon](#)



# Benchmark

## Poem for Friday

### Life

**By** Charlotte Brontë (1816-1855)

LIFE, believe, is not a dream  
So dark as sages say;  
Oft a little morning rain  
Foretells a pleasant day.  
Sometimes there are clouds of gloom,  
But these are transient all;  
If the shower will make the roses bloom,  
O why lament its fall ?

Rapidly, merrily,  
Life's sunny hours flit by,  
Gratefully, cheerily,  
Enjoy them as they fly !

What though Death at times steps in  
And calls our Best away ?  
What though sorrow seems to win,  
O'er hope, a heavy sway ?  
Yet hope again elastic springs,  
Unconquered, though she fell;  
Still buoyant are her golden wings,  
Still strong to bear us well.  
Manfully, fearlessly,  
The day of trial bear,  
For gloriously, victoriously,  
Can courage quell despair !

**Charlotte Brontë** was born on 21 April 1816, in West Yorkshire, UK. She was an English poet and novelist. She was the eldest of the three Brontë sisters. Her siblings were Emily Brontë, Anne Brontë, Branwell Brontë, Elizabeth Brontë, and Maria Brontë. She had a year of formal education at Clergy Daughters' School at Cowan Bridge. Thereafter she and her siblings learned at home, from each other and their parents, and aunt Elizabeth Branwell who lived with the family. She is famous for her novel *Jane Eyre*, which she first published under the pseudonym Currer Bell in 1847. She was married to Arthur Bell Nicholls from 1854 to 1855, for the last 9 months of her life. Nicholls had been the curate



to Charlotte's father, Patrick Brontë, an Anglican clergyman. Charlotte Brontë died on 31 March 1855 in Haworth, England.

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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